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THE OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XIX.

BEING REPORTS OF CASES DECIDED
BY THE
SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

0 VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1917.

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OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XIX.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

AS TO THE NATURE OF A TENANCY UNDER AN EXPIRED LEASE.

Superior Court of Cincinnati.

ELIZABETH T. LONG ET AL V. LOUIS H. KAHN.*

Decided, July 19, 1915.

Landlord and Tenant—Tenant Under Written Lease Holds Over—May be Treated by Landlord as Tenant for One Year or at Sufferance—Effect of Acceptance of Rent—Parol Agreement as to Such Tenancy Within the Statute of Frauds.

1. Where the tenant in possession of premises under a written lease holds over after the expiration of the period fixed by such lease, apparently under the same terms and conditions as those which are prescribed in the original lease, he may be treated by the landlord as a tenant for one year or as a tenant at sufferance, at the option of the landlord.
2. When the landlord accepts rent at the original rate from such tenant for a period of several months he will be presumed to intend

*Affirmed by the Court of Appeals in the parallel case of *Walker v. Bumiller*, 25 C.C.(N.S.), 385.

to treat the tenant as a tenant for a year, and the tenant will be bound to pay rent for such period.

3. An alleged parol agreement between the landlord and tenant while the latter is in possession to create a subsequent tenancy from month to month is within the statute of frauds, and is therefore insufficient to alter the presumption which arises from the holding over, where there is no apparent change in the nature of the tenant's possession.

Cohen, Mack & Hurtig, for the motion.

Charles B. Wilby, contra.

OPPENHEIMER, J.

Memorandum on motion to set aside default judgment.

Plaintiffs allege in their petition that they are the owners of premises which were occupied by defendants by virtue of a lease for three years which expired April 1st, 1914; that defendant occupied said premises and paid the rent up to September 1st, 1914, when he removed therefrom, and that he has since failed to pay rent for them. Judgment was therefore asked for rent for seven months from September 1st, 1914, to April 1st, 1915. Defendant having failed to answer, a judgment was entered by default for the amount prayed for, and defendant now moves to set aside the default judgment, and asks leave to file an answer. In compliance with the rule enunciated in the case of *City of Cincinnati v. Archibale*, 21 C.C. (N.S.), 582, defendant presents the answer which he now seeks to file, in which he alleges that prior to the expiration of the original lease he agreed with plaintiffs that he might be a tenant after April 1st from month to month, and that he paid rent to plaintiffs for the entire time during which the premises were actually occupied by him. It is conceded that the alleged agreement was by parol. We are now required to determine the validity of a parol agreement between a landlord and a tenant in possession of premises under a written lease, when the purpose of the agreement is to create a tenancy from month to month after the expiration of the lease.

This question does not seem to be one of first impression in this state. It was first discussed in the case of *Armstrong v. Kattenhorn*, 11 Ohio, 265. The syllabus of that case reads:

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“A parol contract for lease between landlord and tenant in possession under a prior lease, is within the statute of frauds; unless possession be held solely under, and in performance of, the parol contract, the terms of holding clearly indicating the possession to be under the subsequent parol lease.”

The court says (p. 272):

“But if possession be relied upon it must be clearly referable to the contract and be delivered and held in performance of it. Possession must give the contract life, and if they can possibly be separated, the parol agreement perishes under the operation of the statute. Hence, if the possession can be referred to any other source than the parol contract, which it is claimed to support, even to the wrongful act of the party in possession, or to a different contract, the statute applies. * * * So with a tenant in possession, in case of a parol agreement for different terms of holding, if no acts are performed which clearly show that the possession is continued under the last agreement, it will be referred to the original tenancy, and such parol contract will be void. * * * Possession must accompany the contract, in performance of it, in all cases, to avoid the statute.”

Applying this doctrine to the case at bar, it would appear that, as the possession of defendant was merely continued after the expiration of the original lease, there being no apparent change in the relationship between landlord and tenant, and no alteration in the amount paid, the agreement was within the statute of frauds; and as it rests admittedly in parol, it is not enforceable.

The law is well settled that a tenant in possession under a lease, who holds over after the termination of the time for which the premises were let to him, without any new demise, may be treated either as a tenant at sufferance or as a tenant from year to year. He is generally characterized in the books as a “trespasser” or as a tenant from year to year; but it is perhaps hardly accurate to designate as a trespasser one whose original entry was unquestionably proper and lawful. If the landlord sees fit to require his immediate removal, he may do so, treating him as a tenant at sufferance; or the landlord may treat him as a tenant from year to year, and require the payment of rent

for a yearly period. If the original holding was for a less term than one year, the holding over is for the period fixed in the original lease. See *Taylor, Land. and Ten.*, Section 22; *Wood, Landlord and Ten.*, Section 13.

This rule does not depend upon any agreement of the parties. The tenant has no election in the matter. It is not for him to say upon what terms or for what period of time he will occupy the premises. His intention is not controlling, even though the landlord knows what his intention may be. The premises belong to the landlord, his title thereto can not be disputed, and the right of election is exclusively his. *Conway v. Starkweather*, 1 Den., 113.

The case of *Armstrong v. Kattenhorn* has been repeatedly quoted with approval by our Supreme Court. In the case of *Crawford v. Wick*, 18 O. S., 190, it was held that—

“A parol contract for a new or supplemental lease between a landlord and his tenant, in possession under a former and subsisting lease, is within the statute of frauds, and the continued possession of the tenant does not take the parol contract out of the operation of the statute, where the continued possession of the tenant is as well referable to the first lease as to the second parol lease. *Armstrong v. Kattenhorn*, 11 Ohio, 265, followed and approved.”

The court says (p. 202) :

“Crawford and Murray (the defendants in the original case) did not yield up possession of the demised premises at or about the time of the making of the alleged parol contract, but for years afterward, continued to occupy them right on without any visible change; the possession of the demised premises was continuous and unbroken and is referable as well to the old as to the new or supplemental lease. The case of *Armstrong v. Kattenhorn*, 11 Ohio, 265, is very closely analogous to the present case, so far as this question is concerned and is conclusive of it.”

Substantially the same question was raised in the case of *Myers v. Croswell*, 45 O. S., 543. Plaintiff claimed the right to the possession of several parcels of land under a verbal agree-

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ment for a lease. He had already taken possession of one of the parcels, and contended that this took the case out of the statute. The court says (p. 547):

“It is too well settled to be now open to dispute, that certain acts done in the part performance of verbal contracts for the sale of lands, may operate to take them out of the statute, and generally possession of the land delivered and received under and in pursuance of the contract amounts to such part performance. But it is equally well settled that to have that effect, the possession must be connected with and in consequence of the contract; it must be in pursuance of its terms and in part execution of them. In other words, the possession must pursue and substantiate the contract. * * * The possession must be taken under and by virtue of the contract, and not be a mere continuation of the state of things which previously existed.” *Armstrong v. Kattenhorn* is then cited by the court (p. 548).

The case of *Clark v. Guest*, 54 O. S., 298, involves the question of the validity of a verbal extension of time within which to remove standing timber from land, where the original contract for the sale of such timber was in writing. The court says (p. 305):

“Such verbal extension of time is as clearly within the statute as a verbal extension of a lease, which this court has held to be within the statute. *Armstrong v. Kattenhorn*, 11 Ohio, 265; *Crawford v. Wick*, 18 Ohio St., 190.

“Such extension of time in which to cut and carry away the timber, is not like an extension of time to pay a note or mortgage. Extension of the time of payment does not concern lands or an interest therein. * * * If he (the vendee) intended to rely upon the extension of time he should have caused the contract therefor to be reduced to writing. The statute was enacted to protect men in their property rights and it should be enforced unless in cases clearly within some of the well established exceptions.”

In the case of *B. & O. R. R. v. West*, 57 O. S., 161 (syllabus 1), it was held that—

“An entry under a lease for a term of years at an annual rent, void for any cause, and payment of rent under it, creates a tenancy from year to year upon the terms of the lease, except as to its duration.”

The court, citing *Armstrong v. Kattenhorn, Wood, Land. and Ten.*, and *Taylor, Land. and Ten., ubi supra*, says (p. 167):

“By holding over after the expiration of the term into the next year and paying the rent at the same rate for a part of that year, the plaintiff in error became a tenant for that year upon the terms of the former occupancy, and was not relieved from its obligation to pay the rent for the balance of the year by the abandonment of the premises.”

In the case of *Gladwell v. Holcomb*, 60 O. S., 427, it was held that a tenant, holding over after the expiration of one year, may be treated by the landlord as a tenant for another year or as a trespasser, and that (syllabus 3):

“A parol agreement for a lease to commence in the future, with a person already in possession of the premises as a tenant, is within the statute of frauds.” *Armstrong v. Kattenhorn* is again cited with approval.

In the case of *Moore v. Harter*, 67 O. S., 250, it was held that a tenant holding over after the expiration of a written lease holds as tenant from year to year, upon the terms of the original lease; but where the landlord notifies the tenant before the beginning of the new period that the rent will be increased, and the tenant nevertheless remains in the property, the lease will be modified as to its terms in accordance with the notice. *Armstrong v. Kattenhorn* is expressly distinguished by the court, though the authority of the latter case upon the question which was involved in its decision was clearly recognized. In the case of *Strong v. Schmidt*, 15 C. C., 233, it appears that the defendant had been in possession of the premises under a written lease for one year. Prior to the termination of the original lease, a new lease for another year was written and sent to the tenant, who declined to sign it because the amount reserved as rent was alleged to be excessive. The tenant offered, however, to remain as tenant from month to month at the same rental, but the landlord declined to entertain the proposition. Defendant continued to hold possession of the premises and paid rent at the stipulated rate, but moved before the expiration of one year.

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The landlord was permitted to recover the balance of the rental for the year. The court, after citing the cases of *Armstrong v. Kattenhorn*, *supra*, and *Myers v. Croswell*, *supra*, says (pp. 238-9):

“The rule of law is—it is said that the presumption of law is—that he holds under the former contract from year to year. The language is varied by different courts in delivering the opinions; by some it is said to be a ‘presumption,’ by some it is said to be an ‘implied contract,’ and by some it is said to be a ‘constructive contract;’ but no matter what it is called the law clearly is, that where the party has continued in possession after the termination of a year’s lease and the landlord has accepted rent from him, that the lessee holds for another year, and that the same is as binding and obligatory upon both parties, as it would be if re-executed. The landlord can not evade it only at the expiration of the year, nor can the tenant leave possession of the premises. He is likewise bound to pay rent for the year. If he chooses to leave the premises, his obligation still remains to pay. It is a binding contract. That contract can only be set aside in some manner that has reference to the law of the land. There are two, and perhaps three, ways in which it can be set aside: a new contract may be made, and there may be a surrender of the premises; but the new contract, in order to be binding, must be either a contract in writing under the statute of frauds, or it must be, if a parol contract, in pursuance of a change of possession, as the Supreme Court has said, which makes a new and binding contract.”

In the case of *Schneider v. Curran*, 19 C. C., 224, it is held:

“A parol contract for a lease between a landlord and a tenant in possession under a prior verbal lease is within the statute of frauds and void, and the continued possession alone of a tenant does not take such contract out of the operation of the statute; there must be a new possession taken to do this.

“If the original verbal contract of lease was for a term of seven months only, and the tenant holds over and the landlord elects to treat him as a tenant, such tenant can not be held for the period of a year, but only for seven months, the length of the original term.”

We find only two cases which cast any shadow of doubt upon the doctrine here enunciated as the law of this state. The first

case is that of *Wheeler v. Crouse*, 1 C. C., 234 (1885). In that case the tenant occupied the premises under a written lease giving him the privilege of renewal from year to year. At the termination of the first year he notified the landlord in writing that he would remain under the contract only upon condition that certain repairs were made. The landlord refused to make any, whereupon the tenant informed him that he would not retain the premises for another year, but would occupy them only until he could obtain another room in which to do business. To this notice no reply was made by the landlord. The court held that the presumption arising where the tenant holds over after the expiration of his term is rebuttable, and that in this case such presumption was in fact rebutted by the circumstances. The court finds that the written refusal by the landlord to renew the lease, accompanied by the acceptance of rental for one month, indicated that the landlord himself would not recognize the occupant as tenant for a year, and therefore denied him any recovery.

In this case it is quite apparent, however, that the court recognized the notice sent by the tenant, accompanied by the written refusal of the landlord, as a written refusal to accept the defendant as a tenant from year to year, and that after such refusal, the landlord could not adopt a position which was inconsistent with the one which he had taken in writing.

The other case is that of *Hafer v. Corbin*, 6 N.P.(N.S.), 468. Corbin had been a member of a partnership which leased the premises in question from Hafer. Prior to the expiration of the original lease, Corbin, anticipating a dissolution of the partnership, had a conversation with Hafer in which it was alleged that Hafer had agreed to accept him as tenant from month to month at the same rental as that paid by the partnership under the original lease. After occupying the premises for some time, Corbin removed therefrom about the middle of one of the annual periods, and Hafer instituted suit for rent from the time of removal to the expiration of such period. A verdict for the defendant was set aside by this court in general term, the court holding that (syllabus 3):

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“A parol agreement for a lease to begin in the future, made with one already in possession under a prior contract, is void and could not be relieved from the operation of the statute of frauds by entry, inasmuch as the landlord by parting with possession under the subsisting contract has put it beyond his power to give possession.”

This case was reversed without report by the Supreme Court in 72 O. S., 685. The reversal is there placed upon the authority of *Moore v. Harter, supra*. It is unnecessary, of course, for us to point out that an unreported case can have no effect upon repeated and elaborate opinions of the Supreme Court in which a particular doctrine is enunciated. This must be especially true where the reversal is based upon a case which does not even remotely involve the question at issue. The only question involved in the case of *Moore v. Harter* was whether a verbal demand by a landlord for an increase in rental is binding upon a tenant where the tenant remains in possession. It may perhaps seem somewhat inconsistent that the court should hold on the one hand that a verbal lease between a landlord and a tenant in possession under a prior lease is within the statute of frauds, but that the parties may by verbal agreement change the terms of the original tenancy; but that fact will not account for a reversal upon the authority of a case which involves an entirely different question. Accordingly we can attach no importance to the reversal just referred to.

We are therefore constrained to hold that the alleged agreement between Kahn, the tenant in possession, and the plaintiffs was within the statute of frauds, and that therefore the answer which has been prepared does not present a legal defense. For this reason alone, defendants will not be permitted to file it and the default judgment will stand.

It seems proper to say, in view of the elaborate argument presented by counsel, that the rule laid down in *Armstrong v. Kattenhorn* is not universally recognized. In many of the states it is held that even a verbal agreement, when sufficiently proved, will suffice to establish the character of the tenancy after the holding over. Of course where there has been no agreement, it

seems reasonable to infer that a tenant who remains in possession of premises after the lease has expired does so upon the same terms and subject to the same conditions as those by which he had originally bound himself; but he can not be said to hold over as tenant under the original lease. His status is in reality unfixed, and he becomes a tenant only when the landlord elects to treat him as such. If the landlord treats him as a tenant at sufferance only, he can not be subsequently held for rent; but on the contrary if the landlord has affirmed his tenancy, he may not afterwards be treated merely as a tenant at sufferance. *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.), 134. It is apparent therefore that the character of the holding over must frequently be determined solely by the actions of the parties themselves, or by the circumstances surrounding the case; and "when the circumstances are such that no inference can be drawn as to the terms upon which the tenant did hold over, the question must be left to the jury." *Wood, Land. and Ten.*, Section 13.

We have suggested that the verbal agreement must be shown by sufficient evidence. Of course, the inference being that a periodical tenancy is created, the burden of showing an agreement changing such inference would necessarily rest upon him who alleged it; and it is probable that such proof would have to be clear and convincing, to overcome the contrary inference. But the language of the text books for the most part indicates that in the opinion of the authors a verbal agreement, when sufficiently sustained by proof, is adequate to establish the character of the new tenancy. Thus, in *Underhill, Land. and Ten.*, Section 98, it is said:

"The presumption that a tenant holding over and paying rent after the expiration of his term, is a tenant from year to year is as a general rule regarded as only a presumption of fact and continues only until the contrary is shown. * * * As an intention is always an essential element of a contract, if there is no intention there is no lease. The parties are permitted to show what was the true intention by any relevant evidence and the true intention when proved may overcome the implied intention. The right of the landlord to rebut the presumption as against the tenant necessarily confers upon the tenant the reciprocal right to

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rebut the presumption of a tenancy from year to year as against the landlord seeking to recover rent from him upon the assumption that he is a tenant from year to year. * * * If, however, at or before the expiration of the lease the landlord informs the tenant that he will not be allowed to occupy the premises after the expiration of the term except as tenant from month to month, no implied tenancy from year to year will arise." * * *

In *Tiffany, Land. and Ten.*, Section 210, it is said:

"Without reference to the doctrine just discussed, that the landlord has an option to regard the tenant holding over as in for another period or succession of periods, it is evident that the landlord and tenant may agree upon a continuance, or rather renewal, of the tenancy, that is, there may be a new demise by the former to the latter, with a consequent right of possession in the latter. Such a demise may be, and frequently is, in express terms, but it may be inferred from the acts of the parties. * * * Any inference, from the payment and receipt of rent or from other circumstances, as to the character of the tenancy created, upon holding over with the landlord's consent, is one of fact, and may be excluded by evidence that another class of tenancy was intended."

See 24 Cyc., 1011, 1014; *Wood, Land. and Ten., ubi supra*; *Taylor, Land. and Ten., ubi supra*.

We find the claim of the sufficiency of a verbal agreement made between a landlord and a tenant in possession to be sustained also by the cases of *May v. Rice*, 108 Mass., 150; *Shipman v. Mitchell*, 64 Tex., 174, 176; *Montgomery v. Willis*, 45 Neb., 434, 437-8; *Johnson v. Foreman*, 40 Ills. App., 456, 460; *Lally v. The New Voice*, 128 Ills. App., 455, 457.

But whatever may be our view as to the logic of defendant's contention, we feel constrained by the Ohio decisions to which reference has heretofore been made to sustain plaintiff's contention and to deny to defendant the privilege of filing the answer which he has offered.

Accordingly the motion to set aside the default judgment and to give the defendant leave to file the answer will be denied.

COMMENT ON THE QUALIFICATIONS FOR PUBLIC OFFICE.

Court of Common Pleas of Cuyahoga County.

EARLE A. FOSTER V. MAYO FESLER ET AL.*

Decided, October 20, 1915.

Libel and Slander—Published Estimate of a Candidate's Qualifications for Public Office—Not Libelous Per Se, When—Fair Criticism Permissible.

The publication by a "civic league," purporting to voluntarily furnish the public with reliable information concerning candidates for public office, of the statement concerning a certain candidate for office, that—

"His business and court record is such that in our opinion he is entirely disqualified for the Legislature. He should be defeated,"

is not libelous *per se*, and in the absence of an averment of special damages following the publication, no ground for the recovery of damages exists.

Cornelius Maloney, for plaintiff.

Ford, Snyder & Tilden, contra.

KENNEDY, J.

After the jury was impaneled and sworn in this case, and when the plaintiff offered evidence tending to prove the claim made in his petition, the defendants objected to the introduction of any evidence under the petition on the ground that it did not state a cause of action.

The question of law thus raised has been thoroughly discussed by learned counsel, and having listened with attention to the arguments presented, and carefully considered the authorities cited, I come now to pass upon the validity of the objection thus raised by the defendants. The question before the court is simply this: Does the petition state a cause of action?

*Affirmed by the Court of Appeals, *Foster v. Fesler et al*, 25 C.C. (N.S.), 449.

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I conceive it to be the plain duty of the court in an action of this character to construe the words claimed to be libelous, and to decide, from a careful consideration of the language used, together with the occasion for its utterance, and all the attending circumstances as revealed by the petition itself, whether the words complained of are actionable in themselves, or form a basis for an action for damages without an averment of special damages. In a word, the court must say as a matter of law whether or not the words complained of will bear, or carry the meaning attributed to them in the innuendo.

I am aware that this case has been before other branches of this court, and that they have given a construction to the language complained of as libelous, in passing upon the numerous motions and demurrers filed in the case, and were their opinions unanimous, I should feel great hesitancy in deviating from the straight path thus clearly laid out. But they are not unanimous. On the contrary, these opinions are inharmonious and irreconcilable.

I feel free, therefore, to approach the question *de novo* and to decide upon my own best judgment, assisted as I have been by the clear and forceful arguments of learned counsel for both sides. After a careful consideration of the arguments *pro* and *con*, I feel compelled to reject and disregard the innuendo as stated in the petition, for there is nothing in the character of the language itself, nor in the circumstances surrounding its utterance, even tending to indicate that the language is to be taken in any other than its natural and ordinary sense and meaning.

It is clear in this case that Mr. Foster was a candidate for public office at the time of the publication of the matter complained of; that he sought nomination as a candidate for the state Legislature from this county, and that this candidacy was the occasion of the publication complained of.

The defendants, representing a group or organization of citizens known as the Civic League, and, as averred in plaintiff's petition, "purporting voluntarily to furnish the public with reliable information concerning candidates for public office,"

said of plaintiff as such candidate, "His business and court record is such that in our opinion he is entirely disqualified for the Legislature. He should be defeated." This statement was published in the *Cleveland Leader*, a newspaper of wide circulation, at the instance of the defendants, just one week prior to the primary election at which Mr. Foster was to be voted upon, and with reference to him as such candidate. It therefore plainly appears that the occasion gave defendants a right to employ a greater freedom of expression of opinion concerning Mr. Foster's qualifications and characteristics, at least, than would have been permissible had he been only a humble citizen walking along the ordinary private paths of life. He dared the light by becoming a candidate before the people, and he exposed himself voluntarily to a criticism that might be harsh and severe, and might, without becoming a ground for an action for damages, tend not only to hurt his own feelings, but also to make people think less of him than they would had he not thus offered himself as a candidate. This is not only the law in such cases, as I understand it, but also the inevitable human consequence.

In giving expression to this view of the question, I have particularly in mind the opinion written by Judge Phillips in the case of *Shallenberger v. Scripps Publishing Company*, 8 Ohio N.P.(N.S.), 633, which opinion was justly commended by the circuit court when the case came before them, and was later affirmed without report by the Supreme Court. (85 O. S., 492.)

On page 644 of this opinion, in drawing his conclusions, Judge Phillips said:

"I believe the authorities are uniformly to the effect that when one offers himself as a candidate for public office, his qualifications and fitness for the office he seeks may be freely discussed and commented upon in the newspapers or otherwise, so long as the comments are fair and in good faith, and are limited to his fitness for the office. Upon a somewhat careful consideration of the article complained of, in the light of the authorities in point, I must find that, while some of the language employed is coarse and harsh, and while some of the statements are unpleasing and derogatory—perhaps hyperbolical—they are not, in their nature and under the circumstances, calumnious or defamatory."

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Now, the language here complained of is limited to a discussion of Mr. Foster's fitness for the office of General Assemblyman. In effect it says that its publishers have formed an opinion, based upon Mr. Foster's business and court record, that he lacks the qualifications of a legislator, and should, therefore, be defeated. I must say candidly, and weighing carefully the argument of Mr. Maloney, that I can make nothing else out of it, and I think that to be the natural, unstrained construction of the language.

I can well understand that Mr. Foster did not like to have himself thus described, and that his friends resented this characterization of him. And I can also imagine that to some minds the imputation of something more than incompetency might have been conveyed. But in considering the question raised by this objection, I am only concerned with what I believe to be the natural, ordinary acceptation of this language, not what it would mean to some who might possibly see evil in this form of expression. I am utterly unable to see in these words a natural, reasonable insinuation of dishonorable conduct, or of any moral turpitude whatever. No claim is made that his business was injured. In fact, it is admitted that, unless this language is libelous *per se*, this case must fail. I can not see that the words in themselves are calculated to injure Mr. Foster in any other way than in his candidacy for public office, nor that they reflect upon his honor or his good morals, and this view is not weakened, I am sure, when we remember that Mr. Foster was duly nominated by his party one week after the words complained of were published. Therefore, I must say that the words are not libelous *per se*, and since no claim is made that any special damages followed the publication of these words, I am convinced that Mr. Foster fails to state a legal ground for recovery in his petition.

I have given careful attention to this case, and am most desirous of reaching a correct conclusion. I have carefully examined the authorities submitted, and believe that I agree generally with counsel for both sides as to the law applicable to the case.

I have read the case of *Post Publishing Co. v. Moloney*, 50 O.

S., 71, urged by counsel for plaintiff as the controlling case to apply in this situation, and fully agree with the law as therein expressed. I feel with the judge who wrote that opinion that a man does not need to immolate his private character by laying it on the altar of public opinion, exposed to the fires of adverse and unwarranted criticism, when he offers his abilities to the people as a candidate, or even when he accepts public service as an appointed officer. But to falsely say of a man that "he is said to have been in the workhouse and to have a criminal record," as was said in the Moloney case, is far, far beyond saying of a candidate for office that "his business and court record is such that in our opinion he is entirely disqualified for the Legislature. He should be defeated."

These expressions will not bear the slightest comparison, nor can I agree with plaintiff's counsel that the Shallenberger case, of which I have already spoken, is not in point here. It seems to me to be so directly in point as to be controlling. Certainly the language in that case approached much nearer to vituperation and vitriolic sarcasm, and was more directly calculated to be an attack upon the business and professional standing of the plaintiff than is the language complained of here. And yet the court, on demurrer, even with allegations of falsity, malice and bad faith in the petition, found that such language was only fair criticism of a candidate for office, was not actionable in itself, and was supported in this view by both the upper courts.

No; the law of such cases is clear. It is clear under the law, as plaintiff's counsel has said, that the judge must read this language as the ordinary, common, every-day man must reasonably read it. In this way alone I must read it, for I do not claim to be any other or different sort of man; and from my view-point, under the construction that I, as such a man, placed naturally and without strain upon these words, I find no imputation of crookedness, immorality or dishonor upon their face, and therefore feel that there is nothing under the law for this jury to consider.

The objection of defendants to the introduction of evidence under this petition will therefore be sustained.

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**LIABILITY OF VILLAGE FOR CONTAMINATION OF
A WELL.**

Common Pleas Court of Franklin County.

ELLEN WAUGH v. THE VILLAGE OF MARBLE CLIFF.

Decided, May 26, 1916.

Sewage Disposal Plants—Construction of, Undertaken by Municipalities in Their Governmental Capacity—Mistake in Design Distinguished from Negligence in Construction or Operation—Actions Based on Property Rights Distinguished from those for Personal Injuries—Right of Action Based on Nuisance Lies in Tenant as Well as the Landlord.

A municipal corporation in the construction and maintenance of a sewage disposal plant acts in a purely governmental and not in a private or proprietary capacity; and it follows that no cause of action is stated for a purely personal injury against a municipality by the allegation that the basin of a sewage disposal plant was so negligently constructed that the contents leaked therefrom and, percolating through the earth, contaminated the well from which plaintiff obtained her water, causing her to be stricken with typhoid fever.

H. S. Kerr and Eugene Morgan, for plaintiff.
Bennett & Westfall, contra.

BIGGER, J.

Heard on motion of defendant's counsel for non-suit on plaintiff's statement of the case.

Plaintiff in this case brings her action to recover for personal injuries alleged to have been sustained by her by reason of the construction and maintenance in a negligent manner of a sewage disposal plant, the specific charge being, and the only averment of negligence being that a basin, in which sewage was conducted from the sewage system of the village, had been so negligently constructed that it leaked the sewage, which percolated through the soil and entered her well from which drinking water was

obtained for the family, and that by reason of this contamination of the water she contracted typhoid fever, and from which she suffered for a long period of time, and she seeks to hold the village of Marble Cliff liable in damages for this alleged personal injury.

The contention of the defendant, the village of Marble Cliff, is that it is not liable for such injury under the law, and therefore the action should be dismissed.

The question arises upon the statement of the case to the jury.

Plaintiff's counsel, during the progress of the statement, desired to make some statements which were beyond the averments of the petition as to the negligence claimed; objection was made, and upon the ruling of the court that counsel would be confined to the acts of negligence charged in the petition, counsel asked leave during the progress of his argument to amend so as to include averments with reference to negligent maintenance of that which was alleged only to have been negligently created, which was allowed. And thereupon, upon the statement and the pleading, counsel moves the court to arrest the case.

Now that raises the question as to whether or not in the construction and maintenance of sewage purification systems, municipal corporations are liable for personal injuries sustained from their negligent construction and maintenance of the same.

The question is, of course, one of considerable public interest; one which interests not only this village, but many of the municipalities of the state, and, so far as I know, has not heretofore been brought under judicial scrutiny in Ohio.

In the first place, I observe that this is not an action to recover for injury or damage to property rights by the creation and maintenance of a nuisance. Doubtless by virtue of the provisions of the Federal Constitution which provides that no state may enact laws which shall deprive a citizen of life, liberty, or property without due process of law, for injuries to property, without regard to the capacity in which the state or municipality may act, if there be a substantial taking of property, a liability exists. But now this is an action purely for personal injury.

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Unquestionably, under the decisions in this state and elsewhere, if a property owner brings an action alleging injuries from the creation of a nuisance by a municipality, he may recover not only for the extent of damage growing out of his right to the peaceable and comfortable enjoyment of his property, but he may recover damages incidentally caused by illness to himself and his family. But after all, that is only recovery for injury to property, because the right to property carries with it the right to its comfortable enjoyment, and when that is interfered with and the man's comfortable enjoyment is invaded, it is a taking of property. And if it deprives him of the peaceable and comfortable enjoyment of his property, both himself and his family, to which he is entitled as an incident to his property right, he may recover for that. That question has been decided more than once in Ohio.

In the case of *Belloit v. Mansfield* that question was decided, and undoubtedly it is the law. But it is to be noticed that while it may be in the right of the husband, yet when the wife sues purely for a personal injury, we are confronted then with the question as to whether or not a municipal corporation in the erection and maintenance of a sewage purification plant, is liable in damages. And that turns upon the question as to whether or not the municipal corporation in the construction and maintenance of such plants, acts in a purely governmental capacity, or acts in its private and proprietary capacity.

Now I note that much of the argument made by plaintiff's counsel here seems to proceed, as I gather their argument, upon the principle that the complaint made here is one of defect in plan, or fault in plan; and the great weight of authority is that for mistakes of judgment in the plan upon the part of municipal officers in the construction of public works, municipalities are not liable; and that principle is founded upon the legal doctrine that where the officers of a municipality act in a *quasi-judicial* capacity, or in a legislative capacity, that the municipality is not liable for errors or mistakes of judgment. That, I assume, to be true generally, whether the municipality is acting in a governmental capacity or in a private and proprietary capacity;

that for mere errors of judgment liability can not be asserted, but for negligence in carrying out the plans after they are adopted, a municipality is liable when it is acting in a proprietary or private capacity. And I believe the averments of this petition are sufficient to charge negligence in the carrying out of the plans, that is, in the doing of the thing agreed or determined to be done, and not a mere averment that there was negligence in the plans.

For instance, to illustrate the difference, and assuming now that this was a proprietary act upon the part of the municipality, if this basin had been constructed of insufficient capacity so that the water flowed over the top of it, which might be simply be an error of judgment in the construction, there would be no liability; whereas, if it were so negligently constructed as to leak out the sewage, there might be and probably would be, assuming now this was the act of a municipality in a proprietary capacity. But when a municipality acts in a purely governmental capacity in carrying out the orders of the sovereign power—the orders of the state, and acts in a purely governmental capacity—there is no liability either for construction or maintenance, as the court understands the law. That grows out of the principle that the state not being liable to a suit in damages for any negligent or tortious conduct on the part of its officers and agents, that immunity is extended to the municipality when it acts in a purely governmental capacity.

So that presents this question, as I view it, in this case, as to whether or not a municipal corporation under the law of Ohio, when it constructs a purification system, acts in a governmental capacity or in a proprietary capacity.

I do not think it is necessary to go beyond the decisions in Ohio to find a statement of the rule and to reach a correct conclusion upon that proposition.

The first decision in Ohio in which that question was brought under consideration by the Supreme Court of the state is one reported in the 4th Ohio State, in which Judge Ranney renders the opinion, and it is discussed in the usual able and comprehensive manner which distinguished that jurist in all of his judicial

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work. I refer to the case, *City of Dayton v. Pease*. I have not the time to read at length. I read from the syllabus first:

“Municipal corporations are liable for injuries to third persons, resulting from the negligence of subordinate officers or agents acting under their authority and direction, in the construction of public improvements belonging to such corporations.

“In such cases, the maxim, *respondeat superior*, properly applies, in the same manner and to the same extent, as in its application to the liabilities of private individuals.

“But where such agent or officer, although appointed by the corporation, performs duties for or between individuals, in which the corporation has no interest, no such liability arises, and the officer alone is responsible.”

Now the court, you will observe, does not decide the particular point, because, in the view of the court in the case there presented, the municipality was acting in its proprietary capacity. But Judge Ranney discusses that subject, and, I think, states the rule probably as clearly as you will find it stated anywhere as to the line of demarcation. And after discussing a number of cases in which the courts had laid down the rule that for mere errors of judgment upon the part of boards and officers of municipalities in plans of public works there was no liability, and after citing a number of such cases, the judge proceeds to say this:

“In the exercise of the first class, the corporation can not be made responsible for the misconduct of those intrusted with their execution. It embraces all that description of duties, involving judgment and discretion in their exercise, and resulting in prescribing the rules by which the conduct of individuals is to be regulated, or works, either public or municipal, are to be accomplished. And the immunity from responsibility to individuals is grounded upon the same public policy that protects the judge or legislator in the exercise of his duties, and is designed to remove every obstruction to the free exercise of his judgment and discretion.”

Now I call special attention to what he says here:

“It also includes, so far as the liability of the corporation is concerned, the accomplishment of purposes merely public, devolved upon the corporation as a public officer, or agent of the state, with no power to decline their performance.”

Now that is a fair and comprehensive statement, as I conceive it, of the rule.

The judge proceeds further:

“But when a municipal corporation undertakes to execute its own prescribed regulations, by constructing improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed that it is to be treated merely as a legal individual, and as such owing all the duties to private persons, and subject to all the liabilities that pertain to private corporations or individual citizens.”

And he mentions acts of construction and the repair of streets.

Now I think, as I say, that that is a very fair statement of the rule which distinguishes between the liability of municipal corporations for those acts which are proprietary, those public improvements which are undertaken primarily for the benefit of the inhabitants of the municipality, and governmental acts. Benefit and liability work hand in hand. If public improvements are constructed for the benefit of the inhabitants of a municipality, they should be liable for injuries occasioned to the individuals by negligence in their construction. In other words, the same rule should be applied to a municipality when it acts for its own benefit as is applied to an individual. The fundamental principle that a man must use his own so that he shall not injure his neighbor is to be applied as well to municipalities as to private individuals when they are acting in the same way. The laws of the state furnish protection to the individual; they guard his property rights, and he must so use it that he will not do injury to his neighbor. In the exercise of the police power, which is inherent in the state, it may enact police regulations which may require individuals of the state to undertake such public improvements for the benefit of the citizens of the state at large. Some times they are mandatory; not ordinarily, as

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improvements go, but those which involve the public health, I may say. The state does not undertake in the exercise of police power to regulate subdivisions of the state and require them by mandatory act to do something for the public except that which touches the public health. Health boards of municipal corporations, when they act so as to cause personal injury, do not render the municipal corporation liable in an action for damages; and that is purely upon the principle that in such undertakings as are engaged in heré by health boards, the municipal corporation is acting purely as the agent of the state for the benefit of the public at large and not in its proprietary capacity.

You will find, now, when it comes to the preservation of the public peace and the preservation of property, that ordinarily such acts are permissive, but even in those cases—say, for instance, the creation of a fire department where the municipalities are authorized to establish a fire department and they voluntarily act by the creation of a fire department—the courts have always held that no liability can be asserted against the municipality for negligence. That question arose, as counsel doubtless know, in our country, where the question arose specifically as to whether or not the municipality was liable for the negligent conduct of its fire department when giving an exhibition, and a tower killed a man, and it was shown that there was clearly negligence and that the municipal authorities knew that that tower was not properly safeguarded. But the city escaped liability purely upon the ground that in the creation and maintenance of a fire department it acted as a public agent of the state, and the state enjoying immunity from prosecution for such negligence, that immunity was enjoyed by the municipality. That principle has always been applied to fire departments; it has also been applied to the acts of police departments; we are all familiar with that. No liability can be asserted against the municipality for tortious conduct of a police officer; the only liability that can be asserted is against the officer and his bondsman. The same is true with reference to workhouses and institutions of that sort, which a municipality undertakes to carry out under an enabling act of the state.

It was so held in the erection and maintenance of a work-house if there be negligence. For instance, it has been decided if it be erected and maintained in such a way as to be unhealthy and in reality a nuisance, and the health of prisoners is injured or otherwise, by reason of that, no liability can be asserted.

It has also been held that for personal injuries sustained through the negligence of statutory officers of such institutions, municipal corporations are not liable.

That all proceeds simply upon this principle, that the municipality in doing that thing was acting simply under the state and in its stead, and while not for the benefit of the inhabitants of the municipality primarily, yet it was for the benefit of the public. And I am free to say that if the question were a new one, a question which was not put beyond all cavil by a long list of decisions, that it seems to me there is more reason for holding a municipality liable for the negligence of its employees in the fire department, than for the negligence of those who are connected with such a work as sewage purification, and for this reason: the creation and maintenance of a fire department benefits practically no one except the citizens in the municipality. Indeed, it is not very easy to distinguish between the liability of a municipality for negligence of its fire department and negligence of other subordinates—agents of the municipality—when they are acting for the benefit of the people of a municipal corporation. But that question is now put beyond question, of course, by the long list of decisions.

Of course, the same principle is applied with reference to police departments. A municipal corporation acts simply as an agent of the state in the preservation of the public peace, and there is no liability on the part of the municipality for failure to properly preserve the peace and protect the lives and property of the inhabitants of a city.

Now the question is, is this an act undertaken by the corporation purely in a governmental capacity or in a proprietary and private capacity, and, as Judge Ranney says, "for the benefit of the inhabitants of the municipality?"

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Now the statute of this state—you will observe, gentlemen, Section 3872, if I have noted it correctly—contains this provision, and it has always been the law of Ohio, “that municipal corporations may empty their sewage into a river or other suitable place.” I am not able to state when that act was first passed in Ohio, but it has been a law, and is the law now, that a municipal corporation may empty its sewage into a river—terminate its sewers in a river or other suitable place.

Now it is true liabilities have been asserted against a municipality for creating a nuisance in a river; but so long as the sewage is not of sufficient quantity to create a nuisance upon the stream below, unquestionably a municipal corporation acts within its rights when it terminates its sewers in a river. But as the population of the state increased, while that act still stands upon the statute books, the state has found it necessary, in the interest of the public health, to require by mandatory act that when the board of public health determines it is necessary municipalities shall, under the orders of the board of health and in conformity with their plans, put in such purification plants.

Now I have no doubt that it would subserve all the interests of the inhabitants of Marble Cliff to terminate these sewers in the Scioto river. It is not apparent to the court how any particular private advantage is derived by the inhabitants of Marble Cliff from the establishment and maintenance of a purification plant for its sewage so that the affluent from it may enter the river in a pure condition. But, of course, it is apparent why that was enacted. It was enacted for the benefit, primarily, of others than the inhabitants of the village of Marble Cliff. It was enacted, as is apparent at a glance, for the benefit of the health of the community at large, and especially for those who live farther down upon the stream.

Now that is a duty imposed upon the municipality, not in the interest, particularly, of the inhabitants, because all of their purposes and ends would have been subserved simply by emptying the sewer, as the statute provides, into the river; but the public health requires now that a municipal corporation shall

establish and maintain a purification plant, and in doing so, in my judgment, it acts purely as a governmental agency, and that the same immunity which is enjoyed by a municipality in the maintenance and conduct of its fire department and its police department and in the conduct of a workhouse and other similar institutions is enjoyed here. The application of the principle can not be distinguished between the creation and maintenance of a fire department or police department and the maintenance of such an institution as this. Indeed, I think you will find generally that ordinarily the acts of municipal corporations organized under mandatory direction of the state, or under permissive authority conferred by its charter upon the municipal corporation which are undertaken for the health of the community, are undertaken in a governmental capacity and not in a proprietary capacity. So that this duty being imposed now upon the municipality and the inhabitants of the municipality being taxed simply to create this for the benefit of the public, and not for the benefit of the inhabitants of the municipality—applying the language of Judge Ranney that when it is not undertaken by the municipality for the benefit of the people of the municipality, but, as he says, is commanded by the state and without authority to refuse to carry it out—because in this case the municipality could not refuse on the order of the health board, that no liability can be asserted for a purely personal injury.

Now I come back again to where I started, by saying that we are not confronted with the question of injury to property. That presents another question.

I do not think I would quite agree with defendant's counsel in the claim that one must be the absolute owner in fee in order to entitle him to assert a claim for damages to his property interests. I think a tenant may also assert the same right. Indeed, I think an action by both landlord and tenant may lie for injury to the property; if, upon the one hand, a nuisance creates a permanent injury to realty, by the landlord; if it disturbs the temporary possession of the tenant, then by the tenant; and I believe either of them may maintain that right, because it is none the less a

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property right because one is merely a tenant under lease. But that is not the question here presented. This is a question purely for personal injury, and I have reached the conclusion that the municipality is not liable. It is an important question, and one that has not arisen yet in the state, but one which doubtless will arise, as these plants are being created pretty rapidly under the orders of the health board, and I have therefore taken rather more than ordinary time to investigate the question.

I want to say that McQuillin, one of the latest writers on municipal law, you will find discusses this in a very full and comprehensive manner—Section 2622 in Volume 6 of McQuillin on Municipal Corporations, and especially at 2623. I read just briefly what McQuillin says here at 2623 with reference to governmental duties, when imposed upon municipal corporations:

“In the absence of statute, it has always been the law that no private action for tort will lie against the state, since negligence can not be imputed to the sovereign. So, in the various localities or local areas where the state agencies merely perform the governmental functions of the state, and acquire no individual corporate existence, they stand as the state, and, therefore, to hold them responsible for negligence would be the same as holding the sovereign power answerable for its action. It is assumed that no private legal duty rests upon a city to perform governmental functions, and, moreover, ‘their character precludes the idea of the common law rule of responsibility, for there is no standard of reasonable care by which the acts of the government may be tested. The state, through its representatives, namely, the municipal corporations, acts in its sovereign capacity, and does not submit its actions to the judgment of the courts.’ ‘The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised in their prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries.’ But where a state agency becomes a corporation ‘it thereby acquires an identity distinct from its sovereign power, and the principle stated does not prevent the incorporated body from being held liable for its own negligence.’

“The rule is firmly established in our law that where the municipal corporation is performing a duty imposed on it as the agent in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents thereunder, unless made liable by the statute. In other words, unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for ‘neglect to perform or negligence in performing’ duties which are governmental in their nature, and including generally all duties existent or imposed upon them by law solely for the public benefit. Such liability, may, however, be imposed by statute or charter.”

And much to the same effect. So that I have concluded that the petition in this case states no cause of action; at least upon the statement made here no cause of action exists. The court takes notice, of course, of the laws of the state, and that such undertakings are for the benefit of the public and not of a municipal corporation.

And again at Section 2698, McQuillin:

“The damages for which a municipal corporation is liable due to its neglect to observe sanitary precautions in the care and maintenance of its sewers are those arising from injuries to property, and do not, it is generally held, extend to death, sickness and physical discomfort caused by such neglect. Thus, where sickness or death is caused, independent of any injury to property rights, by the pollution of a stream by sewage, the municipality is generally held not liable, on the theory that the establishment of a public sewer system is an exercise of a governmental function; although the contrary has been held in New Hampshire and Vermont. And it is held in several jurisdictions, that where there is an injury to property rights and also to health, damages for the latter may be included.”

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REPORTS OF EXPENDITURES BY PARTY ORGANIZATIONS.

Common Pleas Court of Clark County.

STATE OF OHIO V. H. D. LONG ET AL.

Decided, 1916.

Corrupt Practices Act—Exceptions by Prosecuting Attorney to Statements of Election Expenses—Completeness of Statement Distinguished from Legality of Expenditure—Extent to Which Statements Should be Itemized.

Under the statutory provision that within ten days after an election every committee, association or organization, subject to the provisions of the corrupt practices act, shall file itemized statements showing in detail all moneys contributed or expended, with the names and addresses of those who expended money, the specific nature of each item and the date and purpose for which it was contributed or expended, it is held:

That sufficient particularity as to residence is shown if the name of the city in which the person resides is given.

That the purpose of the contribution sufficiently appears if it is stated that it was to promote the success of the party with which those concerned with the statement are associated.

That all contributions or expenditures should be dated.

That in the statement of a committee chairman the items "miscellaneous expenses," "election day expenses" and "sundry expenses" are sufficiently explicit.

That objection to such items as expenditures for "cigars" and for "workers" does not go to the question of the completeness of the statement.

That the names and addresses of those employed by committeemen to assist at the polls on election day should be given, but it is not necessary to particularize as to the nature of the work done.

That money paid for postage and telephoning should be itemized, and payments for stenographic and clerical help, meetings, etc., should give the names of the persons to whom payments were made together with the dates of payment.

That receipted bills need be filed only in cases of payments of ten dollars or more.

C. E. Ballard, for plaintiff.

John M. Cole and McGrew, Laybourne & MacGregor, contra.

GEIGER, J.

This action is filed by the prosecuting attorney of the county by virtue of Section 5175-14. There are a large number of defendants, but the only cases now in question are those of W. O. Jackson, as president of the Clark county Republican central committee; T. D. Wallace, as treasurer of the Democratic committee, and W. E. Copenhaver as president of the citizens' committee, of the city of Springfield, Ohio.

As to W. O. Jackson, the petition alleges he is the president of the Clark county Republican central committee, which committee aided and promoted the success of the Republican party at the November election, and that said W. O. Jackson, as president, filed in the office of the board of deputy supervisors of election expenses of said Republican committee, which the petition alleges is incomplete in seven (7) particulars therein enumerated.

The petition alleges that T. D. Wallace is the treasurer of the Democratic committee of Clark county, which committee did aid and promote the success of the Democratic party, and that he, within ten days, as treasurer of such committee, filed an alleged statement of account of the expenses of said Democratic committee, which the petition alleges is incomplete in three particulars therein enumerated.

The petition states that W. E. Copenhaver was president of the citizens' committee; that said committee did aid and promote the election of certain individuals for the office of city commissioner at the election of 1915 held in the city of Springfield on November 15, 1915, and that he as such president filed an alleged statement, which the petition alleges is incomplete in three particulars therein enumerated.

The petition prays that the court may issue an order directing the defendants to show cause why they filed incomplete statements of election expenses, and that the court determine the question as to whether the omission was intentional or unintentional.

There are certain provisions of the statutes which are applicable alike to all the cases.

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Section 5175-2 provides that every committee which may have expended any money in connection with any election, shall, within ten days after the election file an "itemized" statement, showing in detail all money contributed or expended.

Section 5175-3 provides that such statement shall contain the names and addresses of each candidate or person who contributed or expended any money, the specific nature of such item, the purpose for which, the place where and the date when it was contributed or expended, and shall specify the balance in the hands of the accounting committee, and the disposition to be made thereof.

Section 5175-4 provides that any individual, other than a candidate, who has expended any money on behalf of any committee, may and if the money was received from a committee shall, within five days deliver to the committee an account stating in detail to whom, when and where and for what purpose, and in what sums he paid out said money, and said account shall be attached to and form a part of the statement to be filed by the committee, but if the committee can not obtain such account from the person to whom it advances the money within the time in which such statement must be filed, such committee shall so recite in its statement, giving the names and addresses of the persons to whom the money was advanced, and who failed to account for the same, and the reasons, if any, for such failure.

Section 5175-5 provides who shall sign and verify the account. Section 5175-6 provides where such account shall be filed.

Section 5175-11 provides that every payment required to be accounted for shall, unless the total expense to any one person be not in excess of \$10, be vouched for by a receipted bill which shall be filed with such statement.

Section 5175-20 provides that within ten days after the hearing, the judge shall render his decision in writing, setting forth whether the person against whom the petition is brought, is subject to the requirements of filing and has failed to file, or has filed an incomplete statement, and whether such failure to file, or the filing of such incomplete statement is due to willful intent to defeat the requirements of the act.

Section 5175-21 provides that if such persons have filed incomplete statements, the court shall render judgment requiring them to file an amendment within ten days after the entry of judgment, and pay the costs of the proceeding, and that the failure to comply with the order of the court shall be deemed a contempt. If such persons have filed an incomplete statement, and such incomplete statement was due, in the opinion of the court, to willful intent to defeat the purposes of the act, the court shall transmit a copy of its decision to the prosecuting attorney.

Section 5175-22 provides that the filing of a materially false or incomplete statement shall be *prima facie* evidence of willful intent to defeat the statute.

Section 5175-26 as amended (105-106 O. L., 437), provides that any person is guilty of a corrupt practice if he directly or indirectly in connection with any election, pays any money for any other purpose than the matters and services set out in said section at their reasonable *bona fide* customary value.

The section then sets out the purposes for which money may be expended, among them being "the circulation of letters, pamphlets and literature bearing on elections." The section provides that any payment for any purpose whatsoever, except as provided in said section, is corrupt practice, and invalidates the election of any person guilty thereof.

In substance, these sections, so far as they relate to the case at bar, provide that the committee, by its president or treasurer, within ten days after an election, shall file an itemized statement showing in detail all moneys contributed or expended, which statement shall contain the names and addresses of each person who contributed or expended the money, the specific nature of each item, and the purpose for which, and the date when it was contributed or expended.

The statute seems to be specific and definite as to these matters, and to have been followed by the forms upon which accounts are filed.

To itemize an account is to state in items, or by particulars, or to state in detail the particulars of the account, so that the account may be examined and its correctness tested.

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Under these provisions of the statute, we will examine first the account of W. O. Jackson. The first objection in the petition is that it does not give the address of each person who contributed money to the committee, nor the purpose for which it was contributed, nor the date when contributed. This allegation seems to be borne out by the account. Of course, any one knows that the contributions were made to aid and promote the success of the Republican party, and possibly in addition, to defeat certain referendum propositions. No date of the contributions is given, nor is the address of any one contributing given, although there can be no doubt as to their real address.

The court would therefore suggest that the accountant amend the account by putting in the date of the payments, giving the residence of the parties, and it may be stated that all parties above listed are residents of Springfield, Ohio, except where same may not be true. The purpose for which the contribution is made may be stated, if true, as being to aid and promote the success of the Republican party.

The second objection is that the account does not show the address of each person who received the money or the date when received. There can be no reasonable doubt as to the address of the persons enumerated as receiving the money, but the date and address may be set out. It might well be inferred that the persons enumerated as having received the sum of \$10 for workers on election day, reside within the city of Springfield, but in order to comply with the technical objection, it might be well to set out the same.

The third objection is that items to W. O. Jackson, in the sums of \$15, \$12 and \$16.04, do not state the purpose for which the money was distributed, or the date when distributed. The three items appear as "miscellaneous expenses," "election day expenses," and "sundry expenses," none of which are dated.

Any one familiar with the conduct of an American election knows the chairman of the committee in the large cities has certain incidental expenses that would be impossible of itemization, not because they are vicious or obnoxious to the law, but because in the heat and hurry of the election, it would be im-

possible for any man, without the services of a secretary at hand, to keep a definite account of the small sundry expenses incident to his position. Of course it may be possible that those who drew the corrupt practice act had no real knowledge of the exigencies of the position of the chairman, but the court is not at liberty to do other than give a proper construction to the statute, even though he may think the Legislature in its efforts at reformation has imposed an impossible burden upon the committee.

It will be observed, however, that the statute calls for the expenditure made by the committee, and not expenditures made by the individual, W. O. Jackson.

By Section 5175-4 it seems to be recognized that an individual may expend money upon behalf of the committee—this statute imposing upon this individual the duty of either filing a statement or of delivering an account to the committee, stating in detail for what purpose he paid out said money received by him from the committee, which statement may be filed by the committee, provided that it can obtain the same within the time in which the committee is obliged to file the statement.

The court is of the opinion that the items of W. O. Jackson, miscellaneous expenses, \$15, election day expenses, \$12, and sundry expenses, \$16.04, in view of their small amount and the official position of W. O. Jackson, as chairman of the committee, are a sufficient itemizing of said expenditures, so far as the committee itself is concerned, except that they should bear the date of payment to Mr. Jackson.

The fourth objection is that the account shows on its face there was illegally spent for cigars the sum of \$14. The court is unable to understand why an item showing the expenditure of \$14 for cigars, renders the account incomplete. It is true that such expenditure is not permitted by Section 5175-26, but that does not reflect upon the truth or completeness of the statement.

The court would not be willing to endorse the proposition that if an expense account sworn to by the person making it, shows items that are forbidden by law, that the court may compel the person making such statement to so amend it as to show items

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that are allowed by law, in lieu of those that are not allowed. The very purpose of the corrupt practice act, in requiring the filing of a statement, is to disclose for what purpose money was expended, and if the person making the account, adhering to the strict truth, states under oath the money was expended for items not allowed by law, such person is very much less subject to criticism than he would be if in order to escape the penalties imposed by the statute he should make and swear to a false statement of the expenditure.

The court is now dealing only with the completeness of the account, and not with the legality or illegality of the items for which money is shown to have been expended, and therefore the court does not feel that the item for cigars tends to show that the report is incomplete.

The fifth objection is that said account recites that \$570 was paid for workers on election day, but does not give the names and addresses of said workers. The account states, in reference to the item of \$570 paid to W. O. Jackson for workers on election day, that the following named persons were in charge of the work in the city precincts, and the sum of \$10 was paid to each for workers on election day; said workers being employed for the purpose of distributing literature. Then follows a list of some 57 persons, who were shown by the evidence to be city members of the Republican central committee. The objection is that the account does not give the names and addresses of the workers, to whom the members of the central committee were to pay the \$10 given to them by the chairman.

The court thinks that the individual members of the central committee to whom the item of \$10 was paid, probably fall within Section 5175-4, which requires that an individual expending money for the committee shall make an itemized statement of such expenditure, which may be filed by the committee, in the event it has secured the same before the date on which it files its account. As far as the expenditure of the money by the committee is concerned, it shows a distribution of \$10 to each of 57 different persons, who thereby became commissioned to

expend the money among the sub-workers of the precinct and became obligated to make a report to the committee of such expenditure. The committee's report of the expenditure is only incomplete in that it does not state it could not obtain an account of such items from the persons to whom the committee had paid the money, within the time in which it was required to file its statement, and the reason, if any, why the committee was unable to secure such itemized statement from the individual committeemen. The report does not show the address of the committeeman to whom the \$10 was paid, except in so far as it indicates they are committeemen working in Springfield. It might be well that the committee should state, and it may do so in bulk, that all the above persons reside in the city of Springfield.

The sixth objection is that after the alleged statement was filed with the deputy supervisors, there was annexed to the same an alleged itemized statement, but that the same was not sworn to as required by law nor the names and addresses of the said alleged workers given. The itemized statement appears attached to the account, and no evidence has been received that it was not so attached at the time of the filing of the account. The objection as to the lack of addresses has already been passed upon.

The seventh objection is that the report does not show what disposition is to be made of the balance in the hands of the committee, amounting to the sum of \$6.38. The committee is to be congratulated that it has a balance and the court assumes that some proper use may be found for the amount, and apparently the law requires that a statement be made of the hopes and expectations of the committee that may be based upon this sum of money. This disposes of the Republican petition.

The first objection made to the report of the treasurer of the Democratic committee is, that it does not give the address of each person who contributed money to such committee, nor the purpose for which it was contributed. This is the same question that has been disposed of in reference to the Republican

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committees' report, and the court will make the same ruling as to this.

The second objection is that the report shows on its face, that it has illegally expended for forty-one workers on election day the sum of \$125, and does not give the names of all of said workers, nor the purpose for which they were employed, nor their addresses. The schedule does give the names of forty workers, and designates the forty-first as a helper to one of the forty. The addresses of these workers should be given.

The prosecutor's most serious objection, as the court understands it, is that the account does not designate the work that was performed by the workers. The Republican committee seemingly was aware of the amendment to Section 5175-26 (105-106 O. L., 437), which eliminated, as a legal expenditure, a provision that persons designated to represent the parties, might be paid for their services by the committee, not in excess of \$5 per day each, and brought themselves within the provision of the statute permitting an expenditure for the circulation of "literature" upon election day.

One definition of "literature" is "a class of writings, distinguished by beauty of style or expression, as poetry, essays, history, in distinction from scientific treatises and works, which contain positive knowledge."

It is not clear to the court what particular literary production relating to the election is permitted by the statute to be distributed among the voters, nor does it appear from the account of the Republican committee the kind chosen by it for the edification and enlightenment of the voters upon election day, but it is possibly safe to assume that the Legislature had in mind the common device of a card, calling upon the electors to support a particular party or individual. This is a serious work of election day, but hardly meets the requirement of the definition of literature, as heretofore commonly understood.

The Democratic committee, seemingly in ignorance of the amendment of the statute passed May 27, 1915, eliminating pay for workers, has stated that its expenditure was for forty-one workers, at \$3 per day, for election day.

The view of the court heretofore expressed as to the Republican expenditure of \$14 for cigars, would cover his view upon this expenditure of \$3 for each worker. It does not effect the completeness of the report that the expenditure is not authorized by statute, and the court is now only dealing with the completeness of said report.

The third objection is that after said statement was filed, there was added the names of workers, but did not give the date when they were paid, nor the purpose for which they were employed, nor was said statement sworn to after the additions were made.

The court has already indicated that the date should be supplied. As to the purpose for which they were employed, the account states it was for workers. By long usage, the employment of "workers" on election day is well understood. Election day work is as much a commodity in elections as are those items of advertising, fire-works, speakers, brass bands, and political and legal advice that precede the day of election, that are set out in the statute as being permitted. There are certain classes of citizens who take an intense interest in the election, who are by statute excluded from participation in the distribution of any of the campaign funds. They may be the less prominent citizens who can not give assistance in the services that have been dignified by statutory enumeration, but the nature and character of the services rendered by them, is well established and time honored. So the court must hold that the designation used in the Democratic committee's report of workers for election day, has a well defined and well known meaning and that it is not necessary to particularize as to the work to be done by them.

The court recognizes that expenditures for this purpose are not authorized by the statute, but as said before, this does not effect the completeness of the report. This disposes of the objections to the report of the Democratic committee.

As to the report of the Citizens' committee, the first objection is that it does not give the address of each person who contributed money to the committee, nor the purpose for which it was con-

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tributed. This objection has already been disposed of as to the other two committees.

The second objection is that it shows on the face that \$907 in money was distributed, but does not give the names and addresses of the persons who received the same, nor the purpose for which it was received, nor the date when received.

The first item, as to Felix Hinkle, as per receipt attached, \$809.90. The attached receipt set out different items of advertising, and of \$125 for agency service. The filing of this itemized statement is permitted under Section 5175-4, and the court believes it is complete enough, although it might not technically meet the provision of this section, in that it was money paid to Hinkle after the election in payment of the items included in his statement, and not money received by him before the election. There is an item of postage and stenographic help (\$285) on which there is no information except that showing its distribution. The court feels that this item should be amended so as to show the amount for postage, and the amounts paid for stenographic help, and the individuals to whom the same was paid. There is an item of \$150 for clerical help. This is not a sufficient itemizing of money thus expended. The report should be amended so as to show the individuals receiving the same, and the amount paid each individual. There is a further item of \$214.17, covered by "messenger service, delivery, supplies, telephone, distribution of literature, and some small meetings—no item in excess of \$10." This can not be regarded as an itemized statement of this expenditure, and the account should be corrected so as to show the amounts paid for each, and the persons to whom paid, together with the dates of payment and the residences of the parties to whom the money was paid. The report should also show what disposition is to be made of the balance of \$172.91. The committee has fallen into error in concluding that because no item exceeds \$10 that it need not be itemized. The reference to the \$10 expenditure is found in Section 5175-11 and provides that for all payments, unless the total payable to any one person be not in excess of \$10, shall be

vouched for by a receipted bill, stating the particulars of expenditure, which voucher shall be filed with the statement. That the item was less than \$10 does not avoid the requirement that it shall be itemized, but only the requirement there shall be a receipted bill.

The court is convinced that none of the omissions made in any of the reports were due to wilful intent to defeat the requirements of the corrupt practice act. The various committees will therefore amend their accounts at the points indicated, within ten days after the filing of the entry, as provided by the statute.

**REMEDY OF A MORTGAGOR WHO HAS BEEN DENIED THE
RIGHT OF REDEMPTION.**

Common Pleas Court of Cuyahoga County.

ADDIE A. HULING V. DANIEL A. HULING ET AL.

Decided, July 6, 1916.

Deed Declared to be a Mortgage—Property Sold By the Mortgagee to an Innocent Purchaser—Redemption Judgment Granted to the Mortgagor.

Where the circumstances surrounding the execution of a deed are such as to require that it be treated as a mortgage, and the mortgagee by conveying the property to an innocent party has put it out of his power to restore it to the mortgagor under his right of redemption, the mortgagor will be given a redemption judgment equal to the difference in the value of the land at the time of the trial and the indebtedness due under the mortgage with interest.

Bayly, Simmons & DeWitt, for plaintiff.

Norton T. Horr, contra.

ESTEP, J.

The plaintiff claims that on or about the 24th day of January, 1911, she being the owner in fee simple of the property described in her petition, duly executed and delivered to the defendant, Daniel A. Huling, a warranty deed absolute for a consideration of \$10. She claims that the said consideration was in fact a

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loan by defendant, Daniel A. Huling, to the plaintiff of \$6,550.23, to be redeemed with interest at 6% on sixty days notice in writing to the plaintiff's agent, Charles S. Huling, said agent being the husband of the plaintiff herein. Plaintiff further claims that said deed was given to the defendant, Daniel A. Huling, as a security for said loan; that it was agreed between the said parties and said Charles S. Huling, acting for plaintiff as her agent, that the plaintiff could, at any time, upon a sixty-day notice in writing, pay the amount of said debt to the defendant, and that the defendant would thereupon reconvey said property to the plaintiff in accordance with the terms of said loan. The plaintiff further claims that she has paid the interest on said loan, also taxes, and was in possession of said property until on or about the 26th day of October, 1915; and that upon that day, without her knowledge or consent, the defendant, Daniel A. Huling, in violation of plaintiff's right of redemption, conveyed the said real estate to one Maude J. Hartman. The said Maude J. Hartman was made defendant herein, but since the institution of this suit she has been dismissed from this action.

The plaintiff states that she is now ready and willing, and hereby offers, to pay the amount found due the defendant arising out of said loan from the said defendant; and she claims that the market value of said property was and is now in excess of the amount of said loan, and that such value is in excess of the sum of \$15,000. She therefore prays for an accounting between the parties, that she be permitted to redeem said premises upon the payment of the amount found due, and that the defendant be ordered to reconvey the same to her, and for such other relief as equity and the nature of the case may require.

The defendant, Daniel A. Huling, answering the claims of the plaintiff, sets up in his answer several promissory notes of different dates owing to him by Charles S. Huling, his brother, and the husband of the plaintiff herein, in addition to the indebtedness set up by the plaintiff in her petition, and claims that when he paid the sum of \$6,550.23 into court in order to redeem said property from sheriff's sale, he was informed by his brother that the title to said property was in him, the said Charles S.

Huling. And the said defendant claims that on that day, and as a part of said transaction, he surrendered a promissory note of \$6,550.23 which was executed to the plaintiff's said brother at the time the said Daniel A. Huling paid the same to the sheriff of this county.

The said defendant further claims that the land contract which was attached to plaintiff's petition, dated the 30th day of January, 1911, was signed by him upon the representation made to him by the said Charles S. Huling that it was a power of attorney authorizing the said Charles S. Huling to sell the premises for his account; and without further examination, and relying upon his brother's representations, he signed the said paper writing.

Said defendant further claims that he has paid all the taxes due and payable upon said property, except the taxes due and payable on or about July 1, 1912, amounting to \$33.89, which his brother, Charles S. Huling, paid to the treasurer of Cuyahoga county, Ohio. And he further says that upon the 26th day of October, 1915, he conveyed the premises in question to the defendant, Maude A. Hartman, who, so far as the said defendant knows, was wholly ignorant of the manner in which this defendant had acquired the title thereto, and wholly ignorant of any possible obligation on the part of this defendant to the defendant, Charles S. Huling, for any part of the consideration received by the defendant for such conveyance.

The said defendant further avers that he received for the conveyance of the property described in the petition, and took therefor, an apartment house located on East 90th street in the city of Cleveland, and says that he is ready and willing to account to and pay over to his said brother, Charles S. Huling, one-half of all that he may receive therefor in excess of sufficient to satisfy the debts hereinbefore recited, and to reimburse him for interest, if any, expenses or advances which he has been required to pay to protect his title. He therefore claims that he holds the property in trust, and not as an absolute owner thereof; and that when the property to which he now holds title, received in exchange for said property described in the petition for the payment of debts owing to him by the said Charles S. Huling,

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is sold, he will divide any excess derived from the sale of said property.

The plaintiff replies to this claim of the defendant, and denies that she has any knowledge of any indebtedness of the said Charles S. Huling to the defendant, Daniel A. Huling, and denies that said Daniel A. Huling held or parted with any securities which he held, and also denies that the statements set out in his answer are true. She further says that she authorized her husband, Charles S. Huling, as her agent, to borrow the \$6,550.23 from the said Daniel A. Huling, and gave as security therefor the deed referred to in her petition; and she further denies all the allegations set up in the answer which are inconsistent with the claims set forth in her petition and which she has not specifically admitted to be true.

The questions presented by these claims of the parties are as follows:

1. Was the warranty deed executed on or about the 24th day of January, 1911, from Addie A. Huling to defendant Daniel A. Huling, an absolute deed conveying to him an absolute title in fee simple, or is the said deed, under all the facts and circumstances in this case, to be treated as a mortgage securing the payment of said loan of \$6,550.23?

2. If it is to be treated as a mortgage, it being conceded that the defendant sold the said property to an innocent purchaser without any notice of the agreement between the said defendant and the plaintiff herein in relation to said title, what is the proper remedy to which the plaintiff is entitled in this action?

The cases in Ohio are numerous upon this question of when a deed absolute in form may be treated as a mortgage, and the two leading cases are as follows: *Larue v. Desenberg et al*, 28 O. S., 371, and *Wilson v. Giddings*, 28 O. S., 554.

I am convinced, under all the testimony in this case, oral as well as written, that the deed held by defendant for the property described in the petition was intended by all parties interested to be a mortgage for the purpose of securing the sum of \$6,550.23, which was advanced by the defendant to the plaintiff for the purpose of redeeming said property from sheriff's sale in the foreclosure proceeding pending in this court.

The land contract attached to the plaintiff's petition was determined upon at the time the deed was executed and delivered on the 24th day of January, 1911, but for some reason was not executed until some days thereafter. This agreement provided for a retransfer by the defendant to the plaintiff of the property described in the petition, upon payment of the amount due him on the loan previously made, together with taxes, interest, and such other legitimate charges as he may have against the plaintiff arising out of the transaction, provided the said sums due him should be paid by the plaintiff upon sixty days notice in writing to said plaintiff.

I am further satisfied, under the proof in this case, that the said defendant never called upon the plaintiff herein to pay said sums; and that upon the 26th day of October, 1915, without notice to the plaintiff or her agent, Charles S. Huling, he conveyed said property to the said Maude J. Hartman and that she was an innocent purchaser without any notice of the equities existing between the plaintiff and the defendant, Daniel A. Huling.

The claim of the defendant that he held this property in trust in order to secure not only the sum of \$6,550.23, but other sums mentioned in his answer, and that he was to dispose of the property and repay the debts which he claims he had secured by virtue of this warranty deed, and divide the balance remaining in his hands, after the payment of said debts, equally between plaintiff and himself, is not sustained by the evidence in this case. There is serious dispute between the parties as to the surrender of the note of \$6,550.23 by the defendant to the plaintiff's agent at the time of the delivery of the warranty deed under consideration. The plaintiff and her agent deny that they ever received said note, and now claim that they are liable upon said note for the full amount of the same with interest. The defendant has been unable to support his claim in regard to the delivery of said note by any testimony, and the said note was not produced at the trial of this cause. I am therefore unable to hold that said note was delivered at said time, and therefore treat the debt as an existing obligation owing by the plaintiff to the defendant, Daniel A. Huling.

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I therefore, under all the proof in the case, hold that the deed executed on the 24th day of January, 1911, by the plaintiff to said Daniel A. Huling, is to be treated as a mortgage securing only the debt of \$6,550.23 and interest due upon the same, and also the taxes paid by the said Daniel A. Huling upon said property with interest thereon, and that the right still exists in the plaintiff to redeem said property.

The plaintiff, in view of the fact that the defendant has wrongfully disposed of this property, asks the court to give her a judgment in redemption, and claims that she should be allowed a judgment in money for the difference between the value of the property described in the petition at the time of trial and the amount of the claims owing by her to the said defendant, Daniel A. Huling. As a matter of course, I have disregarded the claims of Daniel A. Huling made upon the notes owing by Charles S. Huling to him and set up in his answer, except the note of \$6,550.23.

The question which has given me the most serious consideration has been the question of the remedy under all the facts and circumstances in this case. I have not been referred to any case in Ohio providing for the remedy which the plaintiff is now seeking in this action, but I have been referred to several cases in the state of New York, and also to a reference in Jones on Mortgages, Volume 1, Section 341, which reads as follows:

“When the grantee has wrongfully conveyed the property, the grantor may, however, at his election, claim the proceeds of the sale or the value of the land at the time when the debtor's right to have it restored to him is established. But in a suit for the proceeds it is not necessary for the plaintiff to make a tender, as the grantee, by the sale, has put it out of his power to convey.”

The case of *Mooney v. Byrne*, 163 N. Y., page 86, is the case upon which plaintiff mainly relies for the remedy which she now seeks, and is a case which, after the most careful consideration, I have determined to follow. Reading from page 92 of the opinion, I find this language quoted from the case of *Peugh v. Davis*, 96 United States, 322-336:

“It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as

security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when it is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. * * * It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right can not be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates."

Reading from the same page, this language is used:

"The right to redeem is an essential part of a mortgage, read in by the law if not inserted by the parties. Although many attempts have been made, no form of covenant has yet been devised that will cut off the right of a mortgagor to redeem, even after the law day has long passed by. Even an express stipulation not to redeem does not prevent redemption, because the right is created by law."

On page 94 of the opinion it is said:

"The plaintiff, therefore, is a mortgagor, whose right to redeem from the mortgagee in possession has not been cut off nor cut down by any act or omission on her part. * * * Can a mortgagee, by his own act, without a judicial sale or the consent of the mortgagor, destroy the right to redeem, which is so carefully guarded by the courts? The mortgagee could not, by selling the mortgaged premises, change the rights of the plaintiff as against himself. As to him, she still has the right to redeem, for by his act, without her knowledge or consent, he could not annul his covenant to reconvey. That covenant is still in force, and the plaintiff may compel its performance, so far as the rights of third parties, acquired under the Recording Act, will permit. * * * No act of his could utterly destroy her cause of action to redeem. He might affect its value, but he could not take its life. As a substitute for a decree requiring him to repurchase the land and convey it to her, which might be impossible and would be apt to involve hardship, she may treat the value of the land, measured in money presumed to be in his hands when her right to redeem was established, as land, and enforce the right of redemption accordingly. Unless we virtually sanction his wrongdoing by permitting him to defeat her right of redemption absolutely by his own act, upon showing

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a right to redeem, she must be permitted to make the best redemption possible as against him. Because he has put it out of his power to render to her all she is entitled to, he can not refuse to make the nearest approach to it that is left. A court of equity, in order to bring about an equitable result, disregards forms and treats money as land and land as money, when required to prevent injustice. * * * In order to prevent him from making a profit out of his wrong, the law raises the presumption that he now has the full value of the land as a separate fund in his hands, and treating it as land allows the plaintiff to redeem, the same as if it were in fact land. As against the wrongdoer and his estate it will exert all its power to make the plaintiff whole, paying due regard to equities arising through improvements upon the land, so as not to give her more than she is equitably entitled to."

On page 96, quoting from the case of *Meehan v. Forrester*, 52 N. Y., 277, the following:

"The sale was shown to have been made without the consent of Meehan and in violation of his rights, and it does not appear that the plaintiff ever had notice of it. He was not bound by such a sale. He was entitled to his land, on payment of the amount due to Bertine or his representatives. If Bertine, by reason of his own wrongful act, had deprived himself of the ability to restore the land to which the plaintiff is equitably entitled, he or his representatives were bound to account to the plaintiff, at his election, either for the proceeds of sale of the land, or its value at the time when the plaintiff's right to such reparation was established."

Further reading from the opinion on page 96 is the following language directly in point:

"So in the case at bar, the plaintiff established the same right, but the defendant showed that he had placed it beyond his power to reconvey. Thereupon in rebuttal and not as a part of her cause of action, the plaintiff had the right to prove the present value of the land, so as to follow the money presumed to be in the defendant's hands, and redeem that which he had wrongfully substituted for the land, the same as if it were in fact land. Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit. (*May v. Le Claire*, 88 U. S., 217; *Miller v. McGuckin*, 15 Abb. (N. C.), 204; *Enos v.*

Sutherland, 11 Mich., 538, 542.) When he can not restore the land it will compel him to restore that which stands in his hands for the land, and will not permit him to assert that it is not land when the assertion would be profitable to himself but unjust to the one whom he wronged. He can not escape by offering to pay what he received on selling the lands, but must pay the value at the time of the trial. He can not cut off the right of redemption and convert it into a personal liability, for he is still a mortgagee, and subject as such to the mortgagor's rights. The fact that the injured mortgagor need not take the proceeds of the sale, but may insist on the proved value of the land, as well as the pleadings and proofs, show that this is a pure action to redeem, and must be so regarded for all purposes, including the defense of the statute of limitations. While the mortgagor is helpless as against his grantee, she is not helpless as against him."

Without further quoting from this interesting and instructive case, I am convinced that, upon the election of the plaintiff herein, she is entitled to the remedy which she is now seeking. I permitted testimony to be given at the trial relating to the value of the property described in the petition at the time of the trial, over the objection of the defendant herein. The defendant offered no testimony in relation to the value of the property, nor did his counsel cross-examine the witnesses called by the plaintiff upon that subject. I am therefore bound, under the testimony introduced at the trial relating to the value of the property, to find it of the value of \$1,800 per acre.

I am therefore constrained to hold that the plaintiff is entitled to a redemption judgment of the difference between the value of this property at the time of the trial and the amount owing by her to the defendant herein, the said amount to be determined by computing interest upon the loan of \$6,550.23, and also the taxes and interest thereon paid by the defendant.

I note an exception by defendant to this finding, and I also fix an appeal bond in the sum of \$200.

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**BUSINESS FOUNDED ON WIFE'S CAPITAL HELD LIABLE
FOR HUSBAND'S DEBTS.**

Common Pleas Court of Cuyahoga County.

S. E. STRONG, TRUSTEE, v. W. H. BUESCHNER & SONS CO. ET AL.*

Decided, June 7, 1916.

*Husband and Wife—Business Started on Capital Furnished by Wife—
But Managed With Great Skill and Success by Her Husband—Held
to be Liable for His Debts.*

A business conducted in a field open to all, founded on money furnished by a wife without her interest therein being disclosed, and conducted by her husband as his own business though carried on in the name of the husband and sons, from the profits of which the husband supported a family of four after the manner of those in easy circumstances, the capital growing in seven years from \$3,000 to \$40,000 administered by a corporation, and from which original investment there accrued \$70,000 during the seven years period, must be regarded as the result of the skill, genius, enterprise and good management of the husband, and may be subjected in equity to payment of his debts.

Thos. H. Bushnell, for plaintiff.

Klein & Harris, contra.

FORAN, J.

This is an action by S. E. Strong, trustee, against the W. H. Bueschner & Sons Company, a corporation, Matilda Bueschner, the Euclid Music Company, Arthur H. Bueschner and Irving H. Bueschner, praying for the appointment of a receiver to take possession of certain assets and property and subject the same to the payment of the debts of one W. H. Bueschner.

The case was tried upon an agreed statement of facts and admissions of counsel during argument. The stipulation or agreed statement of facts, if not amplified by admissions, would

*Petition in error filed in the Court of Appeals, but dismissed by plaintiff in error without record and at his costs.

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be worthless as evidence upon which to base a decree, and the petition is fatally defective so far as it seeks to subject certain real estate, therein described, to the payment of the debts of the said W. H. Bueschner, and is not satisfactory in other particulars.

The facts as gathered from the stipulations and admissions of counsel are substantially that, before 1904 one W. H. Bueschner was an improvident man, that is his counsel so admits, though the court has serious doubts about it; and that his wife, the defendant Matilda Bueschner, during the year 1904, acquired from her mother \$3,000, which she put into a phonograph or victrola business in the city of Cleveland, and placed her husband, W. H. Bueschner, in charge thereof to run and manage for her.

It is admitted that at this time W. H. Bueschner had no property or assets of his own. The business in which he engaged with his wife's money was conducted under the name of W. H. Bueschner & Sons. All moneys belonging to this business and used in its operation were so deposited as to be wholly and solely controlled by the said W. H. Bueschner, and were checked out in his name. Arthur H. Bueschner and Irving H. Bueschner, defendants herein, aided and assisted their father, W. H. Bueschner, in conducting and carrying on said business; but just what part they had in the management of the business does not appear, as the stipulation merely says, "Her boys were in there too." This, as amplified by admissions, means that Arthur H. and Irving H. Bueschner are the sons of W. H. Bueschner and Matilda Bueschner; and that they were in the phonograph store or place of business, perhaps as salesmen or clerks.

No books of account were kept. Everything relating to the business and its management was controlled and directed by W. H. Bueschner. He had absolute charge of the business, and conducted and managed it as he deemed best. He paid all bills for goods and material used in the business, all household expenses, including his own personal expenses, from the proceeds or profits of this phonograph or victrola business.

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On April 24, 1908, the husband, W. H. Bueschner, leased certain premises in Lakewood, Ohio, as a residence for himself and family, the family consisting of himself, his wife Matilda and the two sons referred to above. The lease was for the term of five years. In the stipulation is this statement: "W. H. Bueschner paid the rent up to May 31, 1911, and refused to pay any more."

Two suits were brought in the municipal court, and one suit in the court of common pleas, against W. H. Bueschner, for unpaid rent on the lease, and judgments were obtained for the entire term of the lease. The judgments aggregate, exclusive of costs, \$1,734.41.

There is perhaps included in this an item of damages for waste or injury to the leased premises. It appears from the admissions of counsel, however, that the family vacated these premises May 31, 1911, for the reason that they were not habitable.

Only one of these actions was heard upon its merits, that is, contested. That was one of the suits brought in the municipal court. Whether this case tried upon its merits was tried to a jury, or whether taken to the court of common pleas on error, does not appear. Judgments for nearly three-fourths of the amount involved were obtained upon default, though personal service was had upon W. H. Bueschner.

If the premises were habitable, it is amazingly strange that they should have remained tenantless for two years in so popular a suburban residence district as Lakewood. Evidently no effort was made by the owner or landlord to secure a tenant; or if any reasonable effort was made, and a tenant could not be procured, it would seem to be conclusive that the premises were not habitable. The claim does not appeal to the court, and under no circumstances would any court resort to a forced or strained construction of legal principles to enforce it.

It is quite apparent that W. H. Bueschner honestly believed these claims for rent of premises during the period his family did not occupy them were unjust and conscienceless; and, thinking himself execution proof, he practically ignored them, and

thus negligently trifled with the rights of himself and family. The judgments, whatever their moral basis, are, however, legally subsisting judgments, and must be treated as though they were based upon actual family necessities.

Referring again to the agreed statement of facts, we find it stated that the phonograph business, begun in 1904 with the money that the wife acquired from her mother; "grew and grew," and that the increment stayed right in the business, until, in December, 1910, it was incorporated as the W. H. Bueschner & Sons Company for \$40,000, and this stock is to-day worth considerably more than par, or has a book value considerably in excess of \$100 a share. Nor is this all, for in 1913 a branch, the Euclid Music Company, grew out of the parent stem, and this branch, organized or incorporated with a capital stock of \$10,000, is today worth \$25,000. Of the one hundred shares of the said capital stock of the Euclid Music Company, only twenty-seven were issued, and these to Matilda, the wife of W. H. Bueschner. Twenty of these shares she divided equally between her two sons, Arthur H. and Irving H. Bueschner. No money was paid for this stock, nor was any of the capital stock of the Euclid Music Company subscribed for paid in cash. A certain amount of goods and merchandise was transferred from the W. H. Bueschner & Sons Company to the Euclid Music Company, and the twenty-seven shares of stock issued to Matilda Bueschner in consideration of these goods or merchandise so transferred. The W. H. Bueschner Company was not paid for the goods or merchandise. Euclid avenue at 105th street has become an active business center of great growing possibilities. The parent company simply located a branch at this center, and placed the control thereof in the hands of Arthur H. and Irving H. Bueschner—and perhaps as a well-merited reward for services rendered the parent company. Legally, of course, this branch is a distinct and separate corporation. The sons also own forty-five shares of the stock of the W. H. Bueschner Company, though, so far as the stock certificate book indicates, the control of that company is nominally in Matilda Bueschner, the husband, W. H. Bueschner, as appears

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by the books, holding only a voting share. Who the officers of the W. H. Bueschner Company are does not appear, the stipulations simply stating that after the incorporation "the business has been carried on as before. W. H. Bueschner was not paid any salary, nor did he have any salary." But he still draws all moneys to run the family and the business; that is, the corporation is run and managed by W. H. Bueschner precisely as he managed and conducted the co-partnership, if one existed between himself and sons.

It is claimed in the petition that a certain piece or parcel of real estate in Avon township, Lorain county, Ohio, appearing of record in the name of Matilda Bueschner, is in truth and in fact the property of W. H. Bueschner. There is not a scintilla of evidence in the agreed statement of facts or admissions of counsel, as the court now recalls, as to when or how this real estate was acquired, or how the title thereto was obtained, or who paid therefor; and it will therefore be wholly eliminated from any holding or finding herein made. For aught the court knows, it may have been purchased or owned by Matilda Bueschner before these transactions arose, or thereafter purchased with her own individual property or money.

In view of the statements of facts herein outlined, counsel for plaintiff claims that the issues involved, on the facts stated, fall squarely within the rule laid down in *Glidden v. Taylor*, 16 Ohio St., 509, where it is held in the syllabus:

"A husband, who had failed in a manufacturing business, commenced business anew with the money of his wife, with her consent, and carried on the business, professedly as her agent, for years, making large profits therefrom. A principal source of the profits was the personal services and skill of the husband. The wife gave no personal attention to the business. There was no contract between her and her husband as to his compensation; and no accounts were kept between the parties. Part of the proceeds of the business was applied to the support of the family, part used by the husband, and part invested in real and personal property in the name of the wife. In a suit by the creditors of the husband, to subject the property so purchased to the payment of his debts, *Held*:

“1. The wife can not claim the whole of the property as profits arising from her separate money.

“2. Where she thus suffers her money to be employed by the husband, and blended with his earnings, so that it can not be separated, the most favorable position she can be allowed to assume, is that of a preferred creditor in equity, and, as such, entitled to her money and interest.”

We are reluctantly constrained to hold that the contention of counsel for plaintiff is sound. We can see no escape from that conclusion. Indeed, the facts in the case at bar present stronger reasons for so holding than do the facts in *Glidden v. Taylor*, where the rule just quoted is stated. In *Glidden v. Taylor, supra*, the business was carried on in the wife's name, the husband acting as her agent or manager. In the case before us the business was started in 1904 and was carried on by the husband in his own name, or perhaps in the name of W. H. Bueschner & Sons. So far as the public knew, the business was the business of W. H. Bueschner; and if he was acting as agent, the principal was not disclosed. The money obtained from the wife was in fact treated by W. H. Bueschner as a gift, treated as his own money, used as such in a way that left no doubt as to how he in fact regarded it; and this treatment of this fund by the husband was acquiesced in by the wife, so far as the record shows, at least from 1904 to December, 1910. Counsel for defendants recognize the force of plaintiff's contention, but seek to avoid it by insisting that the doctrine of *Glidden v. Taylor, supra*, is no longer the law in this state, or in any other jurisdiction in the United States. In this we can not agree with counsel. *Glidden v. Taylor, supra*, has never been overruled or modified and is still the doctrine in Ohio, so far as the facts in that case are concerned. We are told that the rule or principle applicable to the case at bar is correctly stated in *First Nat. Bank v. Rice*, 12 Circ. Dec., 121; 22 C. C., 183. It is fundamental that in the application of precedents it must be remembered that every case is decided on its own facts; and no decision of an appellate or Supreme Court is to be regarded as precedent by a lower court, unless the doctrine therein announced can or

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may be consistently applied to similar conditions and facts. It is not sufficient that the rule or doctrine announced purports to be or is claimed to be of general application. The doctrine in *Glidden v. Taylor, supra*, is based upon the facts of that case; and it will not be said that the doctrine in *First Nat. Bank v. Rice, supra*, is in conflict therewith unless it can be fairly said the doctrine announced in *Glidden v. Taylor, supra*, may be consistently applied to the facts and conditions in *First Nat. Bank v. Rice*, or, in other words, that the facts in the latter case are practically and substantially the same as in *Glidden v. Taylor*. The facts in the case of *First Nat. Bank v. Rice*, however, are in no way similar to the facts in the case at bar, or to the facts in *Glidden v. Taylor, supra*. In part 3 of the syllabus in *First Nat. Bank v. Rice, supra*, it is held:

“Although at a wife’s request her husband attended to the management and control of a corporation in which she was interested, and by his skill and labor helped to produce valuable results, real estate purchased by her with money arising out of her share of the profits of the corporation can not, upon that ground, be subjected to the payment of her husband’s debts.”

With the proposition that profits accruing from capital stock actually and in good faith owned by a married woman, and acquired by her separate money or property, are not liable for her husband’s debts, we are, within certain limits, in accord. At least we find no fault with the doctrine laid down in the case of *First Nat. Bank v. Rice, supra*. In that case the wife entered into partnership with her son and a third person. The husband had no connection with the partnership, or any interest therein, nor did he ever have any control or management thereof. When the business of the partnership was incorporated, the husband was given two shares of stock in order to qualify as a director. The wife, son and husband owned but one-half of the stock, the other half being owned by a stranger or person outside of the family. The entire stock was only \$5,000. The company was manufacturing a patented article. In about eighteen months after the incorporation Mrs. Rice and

her son sold their stock to the other stockholder at a profit of nearly \$40,000. The skill or labor of the husband had but little to do with the matter. The patent was undoubtedly the real cause of the success of the venture. The husband's connection with the corporation lasted but about eighteen months. In the case now before us, W. H. Bueschner, in 1904, received \$3,000 from his wife, which he treated as his own, and which he was permitted by his wife to treat as his own property. By his management, skill and labor, the profits from the \$3,000 supported a family of four in a residence for which an annual rental of \$800 was being paid for at least a portion of the time. This family was supported for six or seven years from the proceeds of a business begun and established with \$3,000. Not only that, but the business so "grew and grew" that at the end of these six or seven years it was incorporated for \$40,000. Admitting that W. H. Bueschner expended \$5,000 a year on himself and family, and this is a moderate estimate, it will be seen that out of \$3,000 there accrued in six or seven years the enormous sum of \$70,000. It will be sheer nonsense to say that any considerable part of this sum was wholly due to the original investment. That careful management, skill and business acumen were largely responsible for this wonderful result must in common fairness be admitted. When Matilda Bueschner was issued two hundred shares of the stock of the incorporated business, having an actual value largely or considerably in excess of \$20,000, can it in fairness or justice be said this was her money? During the six or seven years preceding this issue, at least \$30,000 had been expended on her family of the increment of the original \$3,000. Surely the wonderful Ash of the Edda or Jack's Beanstalk had no more phenomenal growth. Counsel for plaintiff, like a good general, seeks to anticipate the thrust at this weak spot in the armor of his defense by claiming that this extraordinary increase was the result of the phenomenal growth of the phonograph or talking machine business. But then the most successful business, so far as growth and development are concerned, has its limitations, and, unless monopolized by patents, is open to all. In this field Briarean competition

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is to be met as in all fields of business endeavor. Here as elsewhere there has been a common contest and striving for the same object. Trials of skill, tests of superiority, comparative fitness, are as noticeable here as in any business line. W. H. Bueschner may have been improvident in times past, but, judging by results, he is apparently a man of rare business genius and ability—that the personal equation has loomed large. Before the incorporation he used the name of W. H. Bueschner, and retained this name as the forefront of the corporate name.

In this case then, before we consider the question of managing a corporation in which a married woman holds stock, there is an antecedent question, or how did the married woman acquire the stock, and whose money paid for it? If the rule laid down in *Glidden v. Taylor, supra*, is the law in this state, there can be no escape from the conclusion that the stock issued to Matilda Bueschner was paid for with money earned by the skill, genius, enterprise and labor of her husband, W. H. Bueschner, and in equity the stock belongs mainly to him and may be subjected to the payment of his debts.

It is insisted that the facts in the case before the court bring it within the rule laid down in *Mayers v. Kaiser*, 21 L. R. A., 623, where it is said in the syllabus:

“A debtor may give his personal time, attention and services to the management and conduct of his wife’s business for a series of years, without making the principal invested in or produced by such business or any part thereof, subject to his creditors, if the wife is actually the owner of the business.

“2. A debtor’s time, talents and industry are at his own disposal, and his creditors have no claim thereto.”

It will be noticed that the doctrine of this case is based upon the fact that “the wife is actually the owner of the business.” This distinction should not be lost sight of. This is a Wisconsin case, and was an echo of the great Chicago fire. Kaiser, who lost practically all he had in that fire, began a small business in Wisconsin on money borrowed from his wife, for which he gave notes. The *bona fides* of the transaction between husband

and wife was clearly established. The wife first employed the husband at \$25 a week, and subsequently at \$50 a week. The claim was made that the business was in fact the business of the husband. In *Mayers v. Kaiser, supra*, the court say:

“The evidence does not sustain, we think, the charge that what he (the husband) did was in pursuance of any plan or scheme to defraud his creditors.”

That is, the court found the business was the wife's business, and that the money she loaned her husband, with which to begin it, was actually the wife's money, and that she employed her husband at a stated salary to run and manage it for her. And the court further say: “She might lawfully employ her husband, with or without hire, to manage it and assist her in carrying it on.”

The proposition that a man may honestly devote his time and services gratuitously to another is unquestionably sound. In instances where this is done, that is, where the services are rendered gratuitously or practically so, the services are probably worth no more than is paid for them. Where, however, we find a ten-thousand-dollar man 100 per cent. efficient managing the business of his wife, and that business is moving forward with leaps and bounds, one would be apt to seriously doubt the claim that the services were being gratuitously rendered.

For this reason the court; in *Mayers v. Kaiser, supra*, say in the opinion:

“While the court should carefully scrutinize all cases of alleged fraud against creditors, wherein members of the family of a debtor make claim to important or valuable interests, yet judgment can not go upon mere suspicion.”

The doctrine in this case if limited to its facts, is not in such sharp conflict with the Ohio doctrine as the syllabus would seem to indicate. In this state we have legislation which seems to proceed upon the theory that husband and wife are, for all practical purposes, partners engaged in a joint enterprise, not

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only of raising and maintaining a family, supporting themselves and making a home, but also in accumulating property. This legislation is found under title 6, Domestic Relations. These statutes, from Sections 7995 to 8002, G. C., inclusive, are in some respects declaratory of the common law, but they are in many respects in contravention thereof. By them it is enacted or provided that husband and wife contract toward each other obligations of mutual respect, fidelity and support; that the husband is the head of the family; that he must support himself, his wife and his minor children out of his property or by his labor, but if he is unable to do so, the wife must assist him so far as she is able. Neither husband nor wife has any interest in the property of the other, except that with respect to rights of dower; and the husband and wife may enter into and engage in transactions with each other the same as if unmarried; but they can not alter their legal relations, except that they may agree to an immediate separation and make provision for the support of either of them and their children during the separation; and, further, that either may take hold and dispose of property, real or personal, the same as if unmarried; and neither is answerable for the acts of the other.

To a large extent, the purpose of the Legislature in enacting this legislation was to do away with the common law rules with regard to interests and rights of husband and wife in the property of each other. *Hart v. Sarvis*, 3 Dec., 708; 3 N. P., 316. But before the passage of these statutes the wife had the right to hold property in her own name, and the husband had no interest therein except such as common law rules gave. The statutes just quoted, among other things, give to the wife the right to contract not only with her husband, but with any other person, respecting her real or personal property; and for that reason the contention of counsel, in their brief, that the rule laid down in *Glidden v. Taylor*, *supra*, has been modified or rendered nugatory by the passage of these acts, is not well taken. While it is true that jurists have always, and perhaps must of necessity, recognize the marriage contract as isolated in large measure from all other kinds of contracts, still it is a

civil contract, even though for the benefit of society and the family it is ordinarily treated as a legal status between the husband and wife. While, under the marriage contract, every resulting right growing out of the relation is absolutely fixed by the laws of the state, still the modern tendency is toward the approximation of that relation as that of two persons wholly and entirely equal before the law, each having indentially the same rights as to the acquisition and control of property. They may by express terms enter into partnership relations with each other, and divide profits in accordance with the terms agreed upon. The wife may furnish the capital, and the husband the skill, labor and experience, the same as other persons frequently do in partnership matters. And why may not a contract of this kind be inferred or implied from their conduct, acts and all the circumstances surrounding their transactions with each other? Suppose, for instance, Matilda Bueschner should be so unfortunate as to find it necessary to bring divorce proceedings against her husband; would she be permitted to say her husband had no interest in the business and property his genius, skill and labor created? Would any court hold he had devoted his services to her business gratuitously, or for his mere clothing, lodging and board? Or would a court say that his services, as a contribution to the partnership, were worth fully as much as her \$3,000 contribution.

Taking this view of the situation, we have no difficulty in realizing that the contention of counsel for the defendants can not be seriously entertained.

In *Patton v. Smith*, 130 Ky., 819 (114 S. W. Rep., 315), the doctrine of *Glidden v. Taylor*, *supra*, is clearly endorsed, though that case was not referred to. It is claimed, however, that the note to this case shows that the doctrine of the case is not in harmony with the weight of authority. The case, however, was one where a farm owned by the wife was managed and conducted by the husband. Of course, the title to the farm being in the wife, the business carried on was necessarily the wife's business and was in her name, no matter how its management was conducted. While it is true that the cases cited in the note are

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against the doctrine laid down, yet the editor says, "this note is expressly confined to cases where a married woman's property, or a business conducted in her name, is managed by her husband so that his labor and skill result in an increment thereof. Cases where a wife's money is used by her husband in a business carried on in his own name as well as where he uses his own money or property in the business of his wife, although carried on in her name, are excluded therefrom."

On that basis or in that view of the case, the preponderance of authority seems to be against *Patton v. Smith, supra*.

We think that a careful reading of all authorities relating to the question now before the court will clearly show that there is, after all, but very little divergence of opinion. In the case before us the husband carried on the business in his name, treated it as his business and managed it as his business, and his wife permitted him to do so; and it must be presumed that it either was his business, and that the money given him by his wife to start it was a donation or a gift, or that the business was carried on for the mutual benefit of both parties. And therefore there will be a decree for the plaintiff, by which a receiver may be appointed, and the assets of the two corporation defendants be subjected to the payment of the plaintiff's claim. The real estate mentioned in the petition is expressly excluded from the operation of this decree.

**INJURIES RECEIVED IN THE COURSE OF
EMPLOYMENT.**

Common Pleas Court of Hamilton County.

HENRY VERKAMP v. INDUSTRIAL COMMISSION OF OHIO.

Decided, December 18, 1915.

*Workmen's Compensation Act—Compensation Payable to Those Who
Receive Injury in the Course of Their Employment—Not During
the Period of Their Employment.*

Compensation is payable, under the workmen's compensation act,
to those who are injured in the course of their employment, and
not to those injured while so employed.

*Burch, Peters & Connolly and George F. Osler, for plaintiff.
John V. Campbell, Prosecuting Attorney, and Charles A.
Groom and Henry G. Hauck, Assistant Prosecuting Attorneys,
contra.*

CUSHING, J.

This cause is now heard on demurrer to the petition on appeal
from the Industrial Commission of Ohio.

The facts as they appear from the pleadings are that the
plaintiff was in the employ of George Hartke, a hardware mer-
chant on Central avenue, in this city. He was sent by his
employer to deliver a package of hardware some distance beyond
the main line of the Winton Place street cars, in that part of
the city known as Winton Place; the package was delivered;
plaintiff started to return to his employer's place of business
and in order to save a little time concluded not to wait for the
jerky but to walk to the car line. He was proceeding on the
sidewalk. While so doing he saw a horse in the street. The
horse was being attended by a veterinary, who called to the
plaintiff to bring him a bridle. Plaintiff left the sidewalk, picked
up the bridle and took it to the veterinary. About that time the
horse lunged and fell on plaintiff, injuring him as stated in his
application for compensation.

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The industrial commission rejected the claim on the ground that the plaintiff was not injured in the course of his employment.

This demurrer presents the question as to whether or not when a person is employed and is injured, they can recover if the injury did not occur while in the course of the employment.

The second paragraph of Section 21 of the act in question reads as follows:

“Every employee mentioned in subdivision two of Section fourteen hereof, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on and after January 1st, 1914, shall be entitled to receive, either directly from his employer as provided in Section twenty-two hereof, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death as is provided by Sections thirty-two to forty inclusive of the act.”

The contention of counsel for plaintiff is that the comma after the word “hereof” and after the word “injured” including within the commas the following language, “who is injured,” and the following phrase within commas, “and the dependents of such as are killed in the course of employment,” that “in the course of employment” applies only to such as are killed in the course of employment, and, therefore, “who is injured, wheresoever such injury has occurred,” is entitled to compensation whether the injury occurred in the course of an employment or not, the contention of counsel for plaintiff being that the statute intended that if a person was employed and was injured while employed, that he should be entitled to compensation.

This paragraph must be read in connection with subdivision two of Section 14 of the same act, which is as follows:

“Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and

also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual, or not in the usual course of trade, business, profession or occupation of his employer.”

The language in subdivision two of Section 14, to which reference is made is:

“But not including any person whose employment is * * * not in the usual course of trade, business, profession or occupation of his employer.”

Reading the two sections together, it seems to me they mean that a person is entitled to compensation when injured in the course of his employment, not otherwise.

This view of the law is strengthened by the case of *Gleisner v. Gross & Bender*, decided by the Supreme Court, Appellate Division, of New York, and reported in the Ohio Law Bulletin of November 22, 1915. In that case, Gleisner was a janitor; at different times he was employed by the tenants of the apartment building of which he was janitor to do work for them; also at times he did carpenter work, attended to the boiler, and such other work as the tenants might require. On the occasion in question he had gone on the building and was fixing a flag pole, and while so doing he was injured. The Supreme Court held that this was not in the course of his employment and he was not entitled to compensation.

It seems to me, therefore, that the intention of the Legislature of Ohio was, that persons who are injured in the course of their employment should receive compensation, and not such as are injured while employed. The latter contention would mean that if a person were injured while at a summer resort in the evening, he would be entitled to compensation if he were employed. Such can not be the intention of the Legislature.

The demurrer, therefore, will be sustained and the petition dismissed unless plaintiff desires to plead further.

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**EXEMPTION OF PROPERTY FROM ASSESSMENTS FOR
IMPROVEMENTS ALREADY PROVIDED.**

Common Pleas Court of Clark County.

JOHN TITLOW ET AL V. CITY OF SPRINGFIELD, OHIO, ET AL.*

Decided, 1916.

*Assessment for Curb and Gutter—Injunction Against Enforcement of
—Where Abutting Owners Have Provided Their Property With the
Same Improvement Under a Previous Ordinance.*

Properties, in front of which are cement curbs and gutters in good repair and theretofore constructed under the provisions of a city ordinance, can not be assessed for any portion of the cost of constructing similar cement curbs and gutters in front of other properties abutting on the same street, and which were constructed as a part of the general improvement of said street by paving and constructing curbs and gutters.

McGrew, Laybourne & MacGregor, for plaintiffs.

E. F. McKee, City Solicitor, and *S. L. Tatum*, contra.

GEIGER, J.

Plaintiffs seek to enjoin the collection of a portion of an assessment against their property bounding and abutting upon West Pleasant street, levied to pay the cost of constructing an asphalt street with cement curbs and gutters along the same.

It appeared upon the trial of the case that the plaintiffs are the owners of property bounding and abutting upon West Pleasant street; that the city of Springfield, in 1907, by ordinance, required the owners of property abutting on West Pleasant street between certain limits, which included the property of the plaintiffs, to construct cement curbs and gutters in front of their respective properties; that thereafter the plaintiffs in compliance with said ordinance constructed said curbs and gutters, which since that time have been in good order and repair; that certain others of the property owners within the limits covered

*Affirmed by the Court of Appeals without report, May 19, 1916,

by said ordinance, neglected to comply with said ordinance, and failed to construct cement curbs and gutters, as required by said ordinance of 1907; that in November, 1912, the city, by proper ordinance, provided for the improving of the road-way of West Pleasant street by grading, constructing cement curbs and gutters and paving with sheet asphalt, such improvement covering that portion of the street included in the ordinance of 1907 as well as an additional length of street.

Under said ordinance the city proceeded to improve the street by paving, and by constructing cement curbs and gutters in front of all the premises bounding on said street, the owners of which had not complied with the ordinance of 1907 and also in front of premises not included in the ordinance of 1907 that thereafter the city passed an ordinance assessing the entire cost of paving said street and constructing cement curbs and gutters in front of the premises where none had heretofore been constructed, upon all the property bounding and abutting on said improvement, by a uniform rate per front foot.

It may be conceded that the city, by virtue of Section 3812, G. C., may assess upon abutting, adjacent and contiguous or other specially benefited land, the cost of the entire improvement mentioned in the statute by one of the three rules therein mentioned—the third being by the front foot of the property bounding and abutting upon the improvement, which was the manner adopted in the present case.

It is claimed, by counsel for the city, that under said rule the city may assess, by a uniform front foot rule, the expense of all the items enumerated in Section 3896, G. C., and that by virtue of these and other statutes, the city was authorized to provide in the improvement under the last ordinance, for the paving of the road-way of West Pleasant street, and for the construction of cement curbs and gutters, and that the entire cost of the same should be assessed against the property abutting upon said improvement, and according to the foot frontage thereof, and that not only was there power in the city council to so assess the cost equally against each abutting front foot, but that it would have been illegal for council, under the ordinance which it

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was empowered to pass, to assess any front foot of said improvement at any rate that might differ from any other foot front abutting on said improvement, and that the city has authority to include in the cost of the improvement all expenses which might necessarily be incident to the making of that particular improvement, and that such expenses might cover the cost of the construction of cement curbs and gutters where none had theretofore been constructed, and that when the work is completed, the entire cost can be assessed uniformly by the front foot, irrespective of the fact that in front of certain property cement curbs and gutters had before been constructed under a prior city ordinance.

It is argued on behalf of plaintiffs that they having, in pursuance of the ordinance passed in 1907, constructed the cement curbs and gutters therein provided for, that they can not now be assessed for any portion of the cost of the construction of the cement curbs and gutters in front of any of the premises which were without curbs and gutters at the time of the last improvement.

There is no doubt but that in making a general improvement of a street, such expenses as are incident to the improvement may be included in the costs and assessed equally upon the abutting property by the front foot rule, but it does not necessarily follow that if the city, by a former ordinance, had compelled certain of the property owners to do a certain portion of the work, that those property owners can be assessed a portion of the cost of doing that which other property owners should have done under a former ordinance, but which they failed and neglected to do.

As to the claim of the city that it could not do other than assess by uniform front foot rule under the method of the assessment adopted by it, the court thinks that from the cases of *Findlay v. Frey*, 51 O. S., 390, *Smith et al v. Cincinnati et al*, 9 Ohio Dec., 806, and *Wilder v. Cincinnati et al*, 26 O. S., 284, the principle may be deduced that the city, in providing for the improvement of the street by an ordinance may pursue the policy of assessing the entire cost equally on each abutting foot, or it may divide

the street into sections, according to widths, and assess the cost of improving each section upon the property abutting on such section, or it may improve portions of a street not contiguous and assess the average cost of the improvement on the abutting front foot that may abut upon different sections of the improvement, even though the same may not be contiguous.

It was, therefore, within the power of the city, in the present case, had it desired to make the improvement in question in that way, to have divided the street into different sections, even though the same may not have been contiguous, where the cost of the improvement differs, for the reason that in front of some property there was already cement curb and gutter, and in front of others, none.

The court must therefore hold that the argument made by counsel for the city, that there was no other way, is not borne out by the authorities.

Counsel for the city cites the case of *Jeager et al v. Burr, Admr., etc.*, 36 O. S., 164, in which it is held that the cost of a street improvement is required to be assessed upon the abutting property, the rate of assessment must be uniform upon all property assessed.

There is a clear distinction between that case and the case at bar which a reading will readily disclose.

It is further argued by counsel for the city that even though the city had the power to make a different rate on the abutting front foot as the property had or had not already been improved with cement curbs and gutters, that having chosen to assess the entire cost equally on all abutting property, it was within the discretion of the city to do so, and the plaintiffs can not now object.

Section 3819, G. C., provides that council shall limit all assessments to the special benefits conferred upon the property assessed, and it is claimed by the property owners that the construction of the curbs and gutters under the last ordinance, in front of property other than their own, was of no special benefit to their property.

The city has sought to introduce evidence tending to show that the plaintiffs' property was specially benefited by the construc-

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tion of the improvement, in an amount equal to or greater than the amount assessed upon each abutting foot.

It must be conceded that the very foundation of the right to levy a special assessment against property is that such property has derived a special benefit from the improvement different from the general benefit accruing to all other citizens.

The principles underlying special assessments upon private property to meet the cost of public improvements, is that the property upon which they are imposed, is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement.

The exaction from the owner of private property of the cost of a public improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation.

The value of the entire benefits conferred upon the property may be assessed upon the land for the cost of the improvement; more, however, can not be exacted without impairing the inviolability of private property, guaranteed by the Constitution. See *Schroder v. Overman*, *Treas.*, 61 O. S., 1; *Walsh v. Barron*, *Treas.*, 61 O. S., 15; *Village of Norwood v. Baker*, 172 U. S. S. C. Repts., 269; *Dayton v. Bauman*, 66 O. S., 379-393; *Railway Co. v. Cincinnati*, 62 O. S., 465-475; *Chamberlain v. Cleveland*, 34 O. S., 551-561.

According to the principles announced in the foregoing cases, it would be perfectly proper that the city should assess against the abutting property owner, the cost, to the extent of the benefit accruing to the property from any improvement, but the benefit must be a special benefit incident to that property, and not one enjoyed by the public at large.

Therefore, where the city seeks to assess against the abutting property the cost of an improvement which is not of special benefit to that property, it exceeds its authority.

In the case at bar it is sought by the city to assess against the plaintiff's property the cost, not of building the plaintiffs' curb and gutter, but the cost of building some other curb and gutter, which is of no special benefit to the plaintiffs' property,

although the same might be in front of property immediately contiguous to that of the plaintiffs. The sanctioning of such a procedure on the part of the city would be dangerous. If the city is empowered to do in other cases as it has done in this, the close-fisted property owner who has been ordered by the city to lay a cement curb and gutter, will wisely refrain from complying with that order until such a time as the city may pass a subsequent ordinance and do the work itself, and assess the cost not only upon his own property, but upon that of his more progressive neighbor, who did comply with the original improvement ordinance. Such a rule would also discourage the private improvement of a street by progressive property owners.

The court is convinced the city has made a mistake in attempting to assess upon the plaintiffs' property what is clearly the cost of the curb and gutter laid, not in front of the plaintiffs' property, but in front of the plaintiffs' neighbors' property.

The finding will therefore be in favor of the plaintiffs, and the defendants will be enjoined from collecting so much of the assessment as was made on account of the expense of laying the cement curb and gutter for the reason that the plaintiffs have already paid for that portion of the improvement, under a former ordinance of the city.

**INTERFERENCE WITH REST AND COMFORT BY
VIBRATION OF ENGINE.**

Common Pleas Court of Hamilton County.

LOUISA V. EMMES v. THE A. NIELEN COMPANY.

Decided, July 27, 1916.

*Injunction—Lies Against Operation of a Factory Engine at Night—
When it Interferes With the Rest and Comfort of a Neighboring
Householder.*

1. Where it is shown by the evidence that the operation of the engine of the defendant causes a vibration in the premises of the plaintiff, so as to seriously interfere with the use of said premises for the purpose of sleeping in the night season, an injunction will be granted as to the operation of the said engine in the night season.

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2. Where the premises of the plaintiff are situated in a neighborhood that is largely surrounded by manufacturing establishments of various kinds, a vibration in her premises caused by the engine of the defendant will not be sufficient to cause the court to enjoin the operation of said engine, where the evidence shows that in so far as said vibration in the day time is concerned it is no greater than the ordinary vibration attendant upon a manufacturing neighborhood.

Dempsey & Nieberding, for plaintiff.

Heilker & Heilker, contra.

GEOGHEGAN, J.

This is an action brought by the plaintiff against the defendant for an injunction restraining the defendant from operating a certain gas engine so as to cause shaking, vibration and quivering in plaintiff's dwelling-house in such a manner as to make it uncomfortable and disagreeable to live in, and for damages.

Plaintiff alleges that she is the owner of a certain brick dwelling-house at No. 1140 Dayton street in the city of Cincinnati; that she and her family have been since February 23, 1903, using said dwelling-house as a family residence; that in October, 1913, the defendant caused to be erected and installed in its business plant at Bank and Winchell avenues in said city, a gas engine to which is attached various machinery moved by belting and gearing; that since the installation of said engine the defendant has caused same to be run and operated day and night without intermission, except on Saturday nights and Sundays; that in so doing defendant has caused and still causes a violent shaking, quivering and vibration of plaintiff's dwelling-house, making it difficult for plaintiff and her family to sleep, and interfering with the comfortable use and occupancy of the said dwelling-house as a home, and has injured said house by cracking the plastering, racking and weakening the house, etc., to plaintiff's damage.

The defendant answers admitting the occupancy of the dwelling-house by plaintiff as alleged in her petition, and further saying that it, the defendant, has occupied the building at Bank and Winchell streets for a number of years for manufacturing purposes; that the neighborhood is a factory or manufac-

turing neighborhood; that the gas engine complained of has been in use for more than two and a half years, and that since the filing of the action herein it has, on recommendation of plaintiff's expert, built a new and substantial concrete foundation for said engine at considerable cost, and that it has made a number of other changes at considerable cost. Defendant further avers that if plaintiff's house vibrates, such vibrations are due to other causes; that Dayton street in front of plaintiff's property is a much traveled street; that many heavily laden wagons and trucks pass along said street, which cause plaintiff's house to vibrate; that plaintiff's house is very old, built on filled ground and has been subjected to hard use.

With the issues made up as aforesaid, the case came on for trial. The court heard all the evidence and made a personal inspection of the neighborhood, the premises of the plaintiff and the premises of the defendant. At the time of the first visit of the court to the neighborhood, in the presence of the counsel and representatives of both the plaintiff and the defendant, including the experts employed by both parties, a test was made. Instructions were given to have the engine complained of shut down at ten minutes before 4 P. M., which was accordingly done. Immediately the visible evidence of vibration in plaintiff's building ceased. In accordance with further instructions the engine was started again at 4 o'clock, and immediately the vibration started and was continuing when the court left the premises of the plaintiff.

In order to be doubly sure of the fact that the vibrations in plaintiff's building were caused by the operation of defendant's engine, the court made another visit to the neighborhood at a time when the traffic along the various streets had practically ceased and all plants in the neighborhood shut down with the exception of the engine in defendant's factory, and the court again observed that the vibration was continuing in plaintiff's dwelling-house.

From these observations, as well as from the evidence adduced upon the trial, the court is of the opinion that the vibrations in plaintiff's dwelling-house are caused by the operation of defendant's engine, and inasmuch as this now seems to be the only

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matter in dispute between the parties, the only question for determination is what relief, if any, the plaintiff is entitled to under all the surrounding circumstances.

The court has read with a great deal of interest the very carefully prepared and instructive briefs of counsel for both plaintiff and defendant, and it would add nothing to the judicial literature on the subject of nuisances of this kind for the court to write an extensive opinion. Both counsel for the plaintiff and defendant have had occasion to examine this subject in all its aspects, the one as counsel in a hotly contested case, the other as a judge of the Superior Court of the City of Cincinnati, and the court feels with this experience of counsel to assist him, that he has been able to have presented to his mind all the law that is peculiarly applicable to the matter in hand. With that in mind, the court feels that it is only necessary to state the conclusions that he has come to in this matter.

The court is of the opinion that in so far as vibrations that are perceptible in plaintiff's house during the daytime are concerned, no injunction should be granted. While it is true that a vibration does exist in the daytime, the court feels that the same does not offer such an actual, substantial and material injury to plaintiff in the use of her dwelling-house that should call for the intervention of a court of equity. While Dayton street is largely a residential street, nevertheless it can not be denied that the entire surrounding neighborhood is given up largely to manufacturing, and of course this manufacturing has with it the noises, smells and vibrations that are ordinarily attendant upon such use of a neighborhood.

So, it would seem in so far as the daytime vibration is concerned, the plaintiff suffers an injury, perhaps, in common with other persons residing in that neighborhood, and, therefore, the injury can not be said to be of such a nature as would require the intervention of the strong arm of equity to prevent it.

However, a different proposition presents itself in so far as the night season is concerned. While it may be true that a person living in a neighborhood that is largely manufacturing may be compelled to submit to the annoyances and inconvenience that is usually attendant upon such a neighborhood, it can not be said

that this same annoyance must be suffered without relief in the night time.

As was said by Judge Dempsey in the case of *Shaw v. Queen City Forging Company*, 7 N. P., 254 (Superior Court General Term):

“There is a time for work and a time for rest, and where one seeks to work all the time to the discomfort and disquietude of his neighbors, and to a deprivation of the natural rest to which the neighbor is entitled, there is a material interference with the neighbor's rights for which he is entitled to a remedy. (See *Wood on Nuisance*, Section 617.)”

It is conceded in this case that the engine operates until 10:30 P. M. and that when necessities require it is operated until midnight or 1 A. M. Certainly, it can not be denied that plaintiff in her dwelling-house with her family is entitled to the rest that nature requires of people at the time that seems to have been peculiarly provided by nature for obtaining such rest, and the application of the maxim, that every man should use his own as not to interfere with his neighbor in the neighbor's lawful use of his own property, should be applied here.

Therefore, I am of the opinion that in so far as the prayer of the petition is for an injunction restraining the operation of the defendant's plant, it should be granted, at least for the present. It is always difficult to determine just what hours of the night should be included under the term *night season*. The words are capable of a reasonable construction, which means that the matter should be determined from the court's knowledge of all the surrounding facts and circumstances of the case, having regard both for the comfort and convenience of the plaintiff and the successful operation and management of the defendant's business, and it seems to the court, in view of the nature of the vibrations that are caused herein, and in view of the fact that there is no great noise connected therewith, that the hours between 10 o'clock in the evening and 6 o'clock on the following morning should be determined to be the night season for this particular case.

As to the question of damages, the court has had no particular

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advice on the subject and no proof has been offered as to the amount of damages, and therefore, the court can assess none.

The order of the court is that the defendant be restrained from operating his engine between the hours of 10 o'clock at night and 6 o'clock in the morning. This will stand for the present, the court reserving the right to reopen this matter in case of any change in the conditions upon which this opinion has been based.

**IRREGULARITY IN OBTAINING JUDGMENT UNDER
AN AMENDED PETITION.**

Common Pleas Court of Hamilton County.

MARGARET C. BURGOYNE V. ALEXANDER B. SMITH ET AL.

Decided, July 31, 1916.

Vacation of Judgment After Term—Answer to the Original Petition—Renders Unnecessary an Answer to an Amended Petition, When—Irregularity in Obtaining Judgment by Default—Application of the Statute of Limitations—Action by a Divorced Woman for Maintenance of Her Children.

1. A defendant having once answered a petition is not compelled to answer an amended petition, unless the amended petition changes the cause of action from that stated in the original petition; and, therefore, an order of court finding defendant in default for answer to a petition, where in fact he had answered the petition but an amended petition had been filed which did not change the cause of action against him, is erroneous and a judgment thus obtained by default will be vacated after term, for irregularity in obtaining it, under the provisions of paragraph 3 of Section 11631, General Code.
2. The plea of the statute of limitations contained in said answer will constitute a valid defense if supported by proper and sufficient proof.
3. An action by a divorced wife against her husband, to recover for board, clothing and care of the children, is an action upon an implied contract to pay the reasonable value therefor, and is therefore barred within six years, even though a judgment for divorce had been obtained by the wife against the husband and the care and custody of the children had been awarded to her, but no sum had been adjudged to be paid to her for the care and custody of the children.

Galvin & Bauer, for plaintiff,
Peck, Shaffer & Peck, for John D. Meyer, committee for
A. B. Smith.

GEOGHEGAN, J.

Heard on petition to vacate judgment.

The petition to vacate the judgment herein will be granted, for irregularity in obtaining the judgment herein, as provided for in paragraph 3 of Section 11631, General Code.

The plaintiff, Margaret C. Burgoyne, brought her action against Alexander B. Smith and William F. Boyd, executor and trustee under the will of Elizabeth S. Smith, deceased, on March 11, 1910. The petition was for the recovery of certain moneys from the said Alexander B. Smith on account of the care and maintenance and education of his children by the plaintiff, who was his former wife.

It also sought, as a cause of action against William F. Boyd, trustee for Alexander B. Smith under the will of his mother, Elizabeth B. Smith, to subject certain funds said to be in the hands of said Boyd, to the payment of whatever judgment might be obtained against Smith, and it asks that an accounting be required of him of the money and property in his hands as said trustee.

On April 22, 1910, Alexander B. Smith filed his answer, which, after admitting the proceedings in divorce, the birth of the children and the fact of the trusteeship of Boyd, proceeds in the following language:

“The defendant further states that all of said pretended claim against him set up in the petition, that accrued before March 11, 1904, is barred by the statute of limitations, the benefit of which he invokes, and he denies each and every other allegation in the petition contained.”

On May 10, 1910, William F. Boyd, the executor, filed a motion to separately state and number the causes of action in the petition. Before any action had been taken on the motion of the said William F. Boyd, leave was granted to file an amended petition. This amended petition contains precisely the same allegations as against Alexander B. Smith as were contained in

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the original petition, but makes some changes in the allegations as to the said trustee, William F. Boyd, which, however, in the court's judgment, do not substantially change the cause of action attempted to be stated against said Boyd.

Subsequently, on April 21, 1911, an entry of dismissal as to William F. Boyd, executor and trustee, at plaintiff's costs, was made. On September 12, 1913, a motion for judgment was filed, and on September 23, 1913, an entry ordering the cause to be submitted to a jury to assess damages was made, and on the same day a jury was empaneled and sworn and a verdict was had for the plaintiff in the amount of \$10,830; and, further, on the same day, a judgment was entered up for said amount.

The irregularity in this case consisted in the court ordering the cause to be submitted to a jury to assess damages without having the cause regularly set down for trial. An examination of the language of the court's order plainly shows that it was made upon erroneous information as to the state of the record at that time; for it recites that it appears to the court that the defendant is in default for answer or demurrer to the petition for a long period of time. That was not true. The defendant, Alexander B. Smith, had answered the petition. While it is true that an amended petition was filed, this did not change the cause of action against him, and under the great weight of authorities, a defendant having once answered a petition, is not compelled to answer an amended petition, unless the amended petition changes the cause of action from that stated in the original petition. *Pease v. Bartlett*, 97 Ill. App., 493; *Butler v. Thompson*, 2 Fla., 9; *Hudson v. Hudson*, 119 Ga., 637; *Brookover v. Easterly*, 12 Kansas, 149; *Eames v. Morgan*, 37 Ill., 260; *Coal Company v. Britton*, 3 Kansas App., 292; *Smith v. Halliday*, 13 S. W., 1093 (Supreme Court of Arkansas).

While this point has never been precisely determined in this state, as far as the court has been able to ascertain from an examination of the authorities, inferentially, it has been determined a number of times in various decisions of our Supreme Court and courts of inferior jurisdiction. In *Bank v. Telegraph Company*, 30 Ohio St., 555, the court refused to consider a contract set up as a defense in an answer to an original petition,

because subsequently thereto an amended petition was filed as well as an answer thereto, and the answer did not make the original answer a part thereof, nor did it set up a special contract which had been set up in the original answer as a defense, and the Supreme Court decided that in this state of the pleadings, it could only look to the amended petition and the answer thereto alone. By inference, at least, one might suppose that had no answer been filed to the amended petition the answer to the original petition might have been examined by the court with reference to the defense of the special contract set up therein. In *Raymond v. Railway Company*, 57 Ohio St., 271, the court found that the cause of action set forth in the amended petition had been completely changed from that set forth in the original petition, and that therefore the action must proceed upon the amended petition, and all pleadings prior in time should be disregarded.

But it will be observed in this case, as in the case of *Ironton v. Wiehle*, 78 Ohio St., 41, that there was a complete change of the cause of action in the amended petition, and in *Walcutt v. Columbus*, 1 N.P.(N.S.), 225, Judge Evans of the Franklin Common Pleas Court said that the answer to the original petition in that case was not an answer to the amended petition, that the amended petition changed the entire cause of action by pleading additional matter, and that the prayer is for a judgment for a sum of money much larger than that prayed for in the original petition; and he held that the case stood at the time the judgment by default was entered as though no answer had ever been filed, although an answer had been filed to the original petition. But an examination of the opinion will disclose that the court based his conclusions entirely upon the fact that the amended petition substantially changed the cause of action contained in the original petition. It would seem, therefore, that inasmuch as the *ratio decidendi* in the several cases above cited appears to be either a change of the cause of action in the amended petition, or the filing of an answer to the amended petition omitting defenses contained in the answer to the original petition, that one is justified in drawing the inference that in a case like the one at bar our courts would follow the rule supported by the weight of authority.

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So, therefore, having determined that there was an irregularity in obtaining the judgment, the question now remains as to whether or not the answer sets up a valid defense.

I am frank to say that I am not deeply impressed with the claim of the counsel for the committee of Alexander B. Smith, who seeks to vacate this judgment, that inasmuch as Mr. Burgoyne, the second husband of the plaintiff, furnished the means of sustenance to Smith's children, that Smith or his estate is relieved of that responsibility. I believe that no matter what the change in the subsequent marital relations of Smith's wife, the plaintiff herein, may have been, whatever means she obtained from Mr. Burgoyne were for herself and not for Smith's children, and that if she applied the money that she obtained from Mr. Burgoyne partly to the sustenance of Smith's children, that that was a voluntary action on her part for which she might be able to recover from Smith. However, the statute of limitations, if supported by sufficient proof, seems to be a bar at least, to some part of the claim asserted by the plaintiff herein, and I think that Smith is entitled to have the jury consider that defense.

I can not agree with the theory advanced by counsel for the plaintiff that the custody of Smith's children having been awarded to the plaintiff in the divorce proceedings between them, that this action now on her part to recover from him money expended for the support of the children is an action upon a judgment of a court and is not barred until the expiration of twenty-one years after judgment rendered. The case of *Pretzinger v. Pretzinger*, 45 O. S., 452, seems to completely dispose of this contention. That, too, was an action by a divorced wife against the husband to recover for boarding, clothing and care of a child which had been awarded to the wife by the decree of the court. The court in that case, in discussing this question, at page 457, said :

“After a dissolution of the marriage relation by divorce, the parties are henceforth single persons, to all intents and purposes. All marital duties and obligations to each other are at an end, and they become as strangers to each other. Upon the establishment of such new relations, a promise may be implied, on the part of the father, to pay the mother, as well as a third

person, who has supplied the necessary wants of his infant child.”

And at page 463, the court says:

“Although the record shows that the original action in divorce was in the Court of Common Pleas of Darke County, while the petition subsequently filed to charge the husband with the support of the child was filed in the Court of Common Pleas of Montgomery County, it was not sought in the latter court to change or modify, in any manner, the decree in the divorce cause, but only to enforce a claim growing out of a natural obligation of the father, which was antecedent to the decree, and which the decree left unimpaired.”

It is clear from the decision in this case, as well as from the language quoted from the opinion of the court, that the duty to pay for the care and maintenance of one's children arises not because of any decree on the part of the court awarding them to the mother, but because of the natural duty to support them, which may be enforced as an implied obligation by any person who furnishes them support, irrespective of any relationship to them.

While I have not expressly passed upon the point, it may be well to note that at the time this judgment was entered, Alexander B. Smith was an inmate of an insane asylum in Allegheny county, Pennsylvania, having been committed there by order of court. It would seem that by applying the principle laid down in *Johnson v. Pomeroy*, 31 Ohio St., 247, that this judgment should be vacated “for erroneous proceedings against * * * a person of unsound mind, where the condition of the defendant does not appear upon the record nor the error in the proceedings.” However, I have determined that the error does appear in the proceedings, and, therefore, it would seem more proper that this judgment should be vacated upon the grounds set forth in paragraph 3 of Section 11631, General Code. But, if I am in error as to this, then certainly the judgment should be vacated on the authority of *Johnson v. Pomeroy, supra*.

The judgment herein, therefore, will be vacated, and an order will be made in conformity with the findings herein, and such proceedings had herein as are authorized by law.

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DETERMINATION AS TO THE CHARACTER OF THE ESTATE DEVISED.

Common Pleas Court of Hamilton County.

JOHN KILGOUR V. HARRY HEY ET AL.

Decided, October 9, 1915.

Wills—Trust Not Created Where the Object or Person Intended is Not Ascertainable—Presumptions Can Not be Based Upon Presumptions—Commands or Recommendations to a Donee—Construction of the Words “My Family”—Estate in Fee Not Reduced to an Estate in Tail by Language of Doubtful Meaning.

1. A devise of a farm, where made by a batchelor to his nephew who was also a batchelor, with the limitation that it was to be preserved “for himself and his heirs for as many lives as the laws of Ohio will permit, in the name of my family, * * * it being my anxious desire that the said farm where I have resided for twenty-seven years and expended so much money shall continue in my family as long as the law will permit,” does not create a trust in the estate devised to said nephew, because of uncertainty as to the person or object for whose benefit the trust was intended.
2. Where a devise of land in fee simple has been created in clear and unmistakable terms, it can not be reduced to one in tail by subsequent language which goes no further than to create a doubt as to the estate intended.

Suire & Rielly, Worthington, Strong & Stettinius and Dudley C. Outcalt, for plaintiff.

James G. Stewart, for answering defendants.

CUSHING, J.

This action is prosecuted by plaintiff to quiet the title to the land described in the petition, about one hundred and sixty acres in that part of Cincinnati known as Hyde Park, as against any claim of the defendants.

The answering defendants deny that plaintiff has title to the land; that he can not quiet something that does not exist. They say that they are the owners of the property; that they took title from James Hey; that Benjamin Hey was a tenant in tail and that he is now dead; that they acquired the fee to the prop-

erty through Harry Hey, sole devisee under the will of Benjamin Hey.

James Hey, by will dated May 22, 1843, devised the property in fee to his nephew, Benjamin Hey. On April 1, 1845, he executed an "addition and amendment to my will as a codicil." Items third and fourth of that codicil must now be construed.

"Item Third. It is my will and I hereby direct my said nephew, the said Benjamin Hey, to whom I have already devised my real estate, to preserve for himself and his heirs for as many lives as the laws of Ohio will permit, in the name of my family, that portion of my real estate situated in Hamilton county upon which I have resided, known as the Beauteau Hill Farm and being the same I purchased of William Jones by deed dated April 1st, 1818, it being my anxious desire that the said farm, where I have resided for twenty-seven years and expended so much money, shall continue in my family so long as the law will permit.

"Item Fourth. Since I made my last will I have purchased several tracts of land of which I am now seized in fee, and I hereby devise the same, with all the real estate and personal property which I now hold, with the exception of the real estate devised heretofore to my nephew, William Hey, to my nephew, Benjamin Hey, aforesaid, to have and to hold the same to himself, his heirs and assigns; it being my intention to make the said Benjamin my sole legatee and devisee with the exceptions aforesaid."

The case was exhaustively argued by counsel on both sides. Their theories clearly appear from their briefs and are as follows:

The defendants claim that James Hey entailed the property, "My Beauteau Hill Farm"; that Benjamin Hey was a tenant in tail; that all that Benjamin Hey sold to Rukard Hurd was his right of possession and occupancy; that the words "will and direct" used in the codicil are positive and mandatory; that the word "preserve" means to keep; that the phrase "in the name of my family" means the children of Benjamin Hey; and that the estate in tail ripened into a fee in Harry Hey.

Plaintiff claims that both by the will and the codicil James Hey gave his Beauteau Hill Farm to Benjamin Hey in fee simple; that if James Hey by this codicil intended to entail

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this property, he did not do so by the language he used; that if it was the intention of James Hey to create a trust, precatory or otherwise, in Benjamin Hey, that provision of said codicil is void for uncertainty.

Wills should be construed with great liberality for the purpose of arriving at the intention of the testator. But it is also the law that the expressed intention of the testator can not be regarded in the absence of a disposition of the property. Conjecture is not permitted to supply what the testator has failed to indicate.

I shall now consider the two main propositions of defendants' counsel, namely, that by the second codicil to James Hey's will he ingrafted a trust upon the estate in Benjamin Hey in favor of himself and his issue; and, second, that James Hey devised the property to Benjamin Hey and afterwards by this codicil limited the title to an estate tail.

By his will, James Hey gave this property to Benjamin Hey in fee simple, and it is claimed, by the codicil it was reduced or limited to an estate tail.

The rule by which it is to be determined whether or not the estate so given was cut down when considered in connection with the language used by the testator is:

That when property is given absolutely to any person and the same person is, by the giver, who has power to recommend, and has recommended or entreated or wished to dispose of that property in favor of another, the recommendation, entreaty or wish shall be held to create a trust,

First. If the words are so used that upon the whole they ought to be construed as imperative;

Second. If the subject of the recommendation or wish be certain; and,

Third. If the objects or persons intended to have the benefit of the recommendation or wish be also certain.

If the words are so used they ought to be construed as imperative. The words "will and direct" are as strong and imperative as any words in the English language, and if standing alone there would be no question as to the meaning. But they are modified, and the rule above stated is, "if upon the

whole," etc. By the statement that, "to whom I have already devised my real estate," James Hey recognizes that upon the taking effect of the will his nephew had this property in fee.

In the next phrase is the direction to preserve it for himself and his heirs, not the heirs of his body nor the male heirs of his body, but to his heirs. This in law is a fee simple, but just following the foregoing are the words, "for as many lives as the law of Ohio will permit." This is intended as a limitation upon the estate to be preserved, and so far as it goes must be construed and held to be a command on the donee of the bounty of James Hey.

There can be no question as to the subject of the recommendation. It was "my Beauteau Hill Farm," the property in question. Further comment on this second section of the rule is unnecessary.

It is the third section of the rule above laid down that has caused me much difficulty in arriving at a conclusion.

The third subdivision of the rule is: "If the objects or persons intended to have the benefit of the recommendation or wish be also certain."

In this will there is no residuary clause.

Counsel for defendants cite a number of cases to show that the word "heirs" means children.

In proper cases that, no doubt, is true, but it is clear to my mind that James Hey did not have the children of Benjamin Hey in mind when he executed this codicil. He further qualified the word "heirs" by the expression "in the name of my family." James Hey was a bachelor; Benjamin Hey was unmarried at the time of the execution of this will and lived so for thirty years afterwards. "In the name of my family," therefore, was not intended to mean the children of Benjamin Hey, and by no construction of language or application of rules of law can such a conclusion be reached. "My family" clearly means the family name of James Hey. Benjamin Hey might have married and had a daughter, who would naturally have married, possibly before the death of her father. It could not be said in that instance that James Hey meant the children of Benjamin Hey. It was not the family of Benjamin Hey for

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whom the property was to be preserved. It was to be preserved to the heirs of Benjamin Hey in the name of the family of James Hey. In other words, it was the name Hey that the testator had in mind when he drew this codicil. If this provision of the codicil means anything, it is that Benjamin Hey was not to dispose of the land until he came to the end of his life and that he could give it to any one by the name of Hey who was in any degree related to the testator.

If this conclusion be correctly stated, one of two things must follow, either that the word "heirs" did create an estate in fee simple, or, that the objects or persons intended to have the benefit of the recommendation or wish were uncertain and that a trust was not created.

In answer to the contention of counsel for the defendants that the words "my family" mean children, I have to say that "my family" (James Hey's family name) was the object of the trust, if there was a trust. It could not be his (James Hey's) children, or his descendants, as he was a bachelor. Therefore, this part of the codicil must have been uncertain, in fact, not ascertainable.

I desire to call attention to another phase of this expression "my family." Counsel for defendants argued that the words "my family" mean children. By this he means that the decisions of the courts have presumed that the testator meant children. Followed to its logical conclusion, this argument is, that James Hey presumed that his nephew, being a young man, would marry; that in the natural course of events the presumption would be that he would have children; that as the number of male and female children born to parents are about equal in number, the further presumption would be that Benjamin Hey would have a male child, and that this property was intended to be entailed to such male child.

My understanding of the law of Ohio is that a presumption can not be based on a presumption. The law can presume that "family" means "children," but you can not go a step further. You can not presume that a man will marry, presume that he will have children, presume that at least one of those children will be a male, and that that property was intended for him.

The conclusion therefore is, that the object or person under the third subdivision of the rule of trust is uncertain, and that any language which the testator used did not create a trust.

The next contention of defendant is, that this is an estate tail.

Estates tail are either general or special. Tail-general, is where lands and tenements are given to one and to the heirs of his body begotten (meaning all heirs by him begotten). Tenants in tail special is where the gift is restrained to certain heirs of the donee's body and does not go to all of them in general.

Counsel can not contend that he intended a tail general, as it is limited to the name of Hey and only such as bear that name could be considered the donees in tail. It could not mean the male heirs of the body of Benjamin Hey, first, because there is no expression in the will that could, by any construction, be construed into such meaning. If such were attempted the court would, by construction, have to read into the will the words necessary to give such a meaning. My understanding of the law is, that a court can construe the language used by the testator, but he can not add or omit any word or words.

A testator may give such an estate in his lands as his will or caprice direct. A testator can not give a fee simple estate and fetter the power of alienation. He can not use language that has a settled legal meaning and have it construed into another estate by vague and unsettled expressions. A fee simple implies absolute dominion over the land; and in construing a will language which has a settled legal meaning must be given its full effect. When such an estate is created, it can not be cut down by language less clear and certain than that used in creating the estate.

When an estate in fee is created in clear and decisive terms, a restriction upon the right of alienation is of no effect. The law of Ohio up to this time is settled that the intention of the testator shall control the disposition of his property after his death. Courts are bound to take as guides the general rules of interpretation which have been laid down and followed by the courts of last resort in this and the various states. It becomes

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no man and no court to be wise above that which is written. That would be to make a will for him instead of construing what he has made.

Estates tail are not favored in this country, but are in fact either prohibited or, as in our state, very essentially limited and curtailed. The presumption is against the intention to create them and that presumption must be overcome by language entirely free from ambiguity. It is a rule of the courts in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate can not be taken away or cut down by raising a doubt upon the extent and meaning and application of the subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest or estate.

The word "heirs" as used in these codicils was intended as one of limitation. The intention was to give the estate to Benjamin Hey and his heirs, whomsoever they might be, at the time of his decease, and it was to be preserved, or kept, for him and to them, that is, his heirs generally, and the "anxious desire" of the testator was that his nephew, Benjamin Hey, would not permit this farm to pass out of the Hey name.

The conclusion is that a trust was not created as the objects or persons to be benefitted were not certain or ascertainable; that the estate was not entailed as the terms and language used do not come within the rules of law creating such an estate; that the language "to whom I have already devised my real estate" recognize in Benjamin Hey an estate in fee simple, and the subsequent language does nothing more than create a doubt as to what estate Benjamin Hey was to take, that is, the third item of the codicil comes within the rule laid down by the Supreme Court of Ohio, to the effect that when an estate is given by clear and concise language it can not be cut down by raising a doubt as to the meaning of a subsequent clause in the will; that the words "my family" were not intended by the testator to mean the children of Benjamin Hey; that a presumption of law can not be based on a presumption.

Therefore, Benjamin Hey held and conveyed an estate in fee simple to Rukard Hurd. The plaintiff in this action has a fee simple title to the property in question and is entitled to have the same quieted as against the defendants in this action. The answer and cross-petition will therefore be dismissed. A decree will be entered according to the findings herein stated.

The authorities used and from which some of the language in the foregoing opinion was taken are: *Crane v. Doty*, 1 Ohio St., 276; *Collins v. Collins*, 40 Ohio St., 363; *Knight v. Knight*, 3 Beaven, 172-3; *Allen v. Craft*, 109 Ind., 476; 2 Blackstone Com., 113.

**TRANSFER OF TERRITORY FROM ONE SCHOOL
DISTRICT TO ANOTHER.**

Common Pleas Court of Clark County.

STATE OF OHIO, EX REL ORA BEAKLER ET AL, V. THE BOARD OF
EDUCATION OF CLARK COUNTY.

Decided, May 8, 1916.

*Schools—Mandamus to Compel Transfer of Territory—Construction of
Section 4696 as Amended, with Reference to Duty of School Board
Upon Filing of a Petition.*

Where fifty per cent. of the electors of a country school district petition for transfer to another school district, the county board of education may order that the transfer be made; but if the petition contain the names of seventy-five per cent. or more of the said electors, the making of such an order and the passing of the petition on for further proceedings, as provided by statute, is mandatory.

W. H. Griffith, for plaintiffs.

C. E. Ballard, contra.

GEIGER, J.

The relators allege that on the 13th day of December they filed with the defendant, the county board of education of Clark county, and the board of education of Greene county, a petition

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addressed to the boards of said counties, setting up that they are owners of real estate in Mad River township, Clark county, which adjoins the Osborne school district of Greene county, and that the petitioners constitute one hundred per cent. of the electors of the territory proposed to be annexed to the Osborne school district, and praying that the territory be annexed to the Osborne school district; and that on the same day they filed a plat or map of the real estate described in the petition; that on the 26th of February, 1916, the defendant, at a regular meeting, by a resolution duly adopted, denied the prayer of the petition and refused to allow the same, and refused to transfer the territory described therein, and that it still refuses to transfer the same to the Osborne school district.

The relators allege that they are more than seventy-five per cent. of the electors of the territory described in the petition, they being all of the electors residing in said district, and are heads of families having children of school age, and that it is necessary that they be transferred to the Osborne school district of Greene county; that the territory, the transfer of which is sought, is now a part of Mad River township, Clark county, Ohio, school district; the relators pray for a writ of mandamus commanding the defendant, the county board of education of Clark county, Ohio, to grant the prayer of the petition and to transfer the territory to the Osborne school district of Greene county.

To this petition the defendant files a general demurrer, on the ground the same does not state facts sufficient to show a cause of action.

The relators claim that they are entitled to have the territory named in the petition transferred by the county board of education of Clark county to the Osborne school district of Greene county, by virtue of Section 4696, Ohio Laws, 105-106, page 397. This section is as follows:

“A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to

another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer. Provided, however, that if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education *shall* make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board, and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

The relators claim that being more than seventy-five per cent. of the electors of the district sought to be transferred, the mandatory provision of the section applies, and that the Clark county board of education, under said section, is required to make the transfer, and they seek, by mandamus, to compel the discharge of this duty by the defendant.

Mandamus is defined by Section 12283, to be a writ issued in the name of the state to an inferior tribunal, corporation, board or person, commanding the performance of an act which the law specially enjoins as a duty resulting from the office, trust or station.

It is claimed, on the part of the defendant, while the statute states specifically that upon the petition of seventy-five per cent. of the electors of the district, the county board *shall* make the transfer, yet that this provision is directory merely, for the reason that the section further provides that no such transfer shall be in effect until the county board and the board of education to which the territory is transferred, pass resolutions by a majority vote of such boards, and until an equitable division of the funds or indebtedness be decided on by said boards.

It is claimed that the section reserves to the individual members of the board, a right to exercise a discretion as to whether such transfer shall be in effect and that, therefore, a mandamus will not lie to compel the individual members of the board to make the transfer.

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The defendant is sustained in this by the opinion of the Attorney-General, dated October 8, 1915, found in Volume 3, No. 4, of the Department Reports of the State of Ohio, page 146. The Attorney-General, in this opinion, quotes from a former opinion to the effect that—

“It is manifest that mandamus would not lie to compel individual members of a board of education to act under Section 4782, G. C., because the action therein referred to is to be ‘by resolution adopted by the vote of a majority of its members,’ from which it clearly follows that the right of the individual members to vote as they see it, is preserved.”

While Section 4696 as found in the Ohio Laws Volumes 105-106, page 397, has been passed as an amendment to Section 4696, as it formerly existed, it bears but slight resemblance to the amended Section 4696, as found in Ohio Laws Volume 104, page 135, or Section 4696, which was formerly Section 3896, R. S., Ohio Laws Volume 97, page 337.

This section, before the present amendment, bore almost solely upon the question of the distribution of the funds, or apportionment of the indebtedness of the transferred district. In the section, before the amendment, there was no power in the board of education to make the transfer of the territory, this having been accomplished through procedure in the probate court. What were formerly Sections 4693-94-95 and 97, relating to transfer of territory through an action in the probate court, have all been repealed by the act found in Volume 104 Ohio Laws, page 225, so there now seems to remain only the two Sections 4692 and 4696, relating to transfer of territory by a county board.

Section 4692 provides that a county board may transfer a part or all of a school district of the county to an adjoining district or districts of the county, and that such transfer shall not take effect until notice of the proposed transfer has been posted, nor if a majority of the electors residing in the territory to be transferred shall, within thirty days, file a written remonstrance against the proposed transfer.

Section 4696 relates to the transfer by the county board of education, of a part or all of a school district of the county school district to an adjoining village or city school district, or to another county school district—that is, to the school district of another county. This transfer shall not be in effect until the county board of education and the board of education to which the territory is to be transferred, shall each pass resolutions by a majority vote, and until there is an equitable division of the funds.

Under Section 4692, the transfer shall not be in effect if the electors remonstrate. Under Section 4696, the transfer shall not be in effect until the majority of the two boards shall pass a resolution and make an equitable division of the funds.

It is not quite clear as to what the resolutions by the full membership of each board, shall be addressed. The Attorney-General in his opinion concludes that these resolutions must be “in favor of such transfer,” but it is equally possible and more natural to conclude that the resolutions are to be addressed simply to the time at which the transfer shall be in effect. It may, however, be the intention of the Legislature, that where a district is transferred from one county to another, or to a village or city district, that the transfer can not be in effect until the board to which the district is to be transferred has consented to the arrangement. As under Section 4696 the board is permitted to make the transfer, subject to the remonstrance of the electors, so under Section 4696 it may be that the transfer is to be made subject to the concurrence of both boards in the arrangement, not only as to the time when it is to go into effect, but to the plan by which territory in one county is to be attached to another county, village or city district.

However this may be, it appears to the court that it is clearly intended by the section to provide that what *may* be done by the board in case fifty per cent. of the electors of the territory petition for the transfer, *must* be done by the board in case seventy-five per cent. of the electors petition for the transfer. The transfer must be made, so far as the initial act is concerned, but such can not be in effect until both boards have passed resolutions

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by a majority vote of the full membership of each board. This action by the members of the two boards puts into effect the transfer. It may well happen that on account of the arrangement of terms, or the expiration of the school year, that the boards might defer the going into effect of the transfer until some subsequent period, or it might happen that the board to which the territory is to be transferred, might refuse to assume the responsibility of the government of the territory sought to be transferred. It is quite possible that before the transfer goes into effect, there must be the exercise of a discretion by the members of the two boards, which can not be controlled or directed by mandamus, but it seems apparent that the Legislature intended to impose the mandatory duty upon the county board, when seventy-five per cent. of the electors of the district petition, and when such seventy-five per cent. have petitioned, the board must take the initial step. What may happen when the two boards seek, by separate resolutions, to put into effect the transfer, has nothing to do with the initial step that must be taken by the board upon the petition of seventy-five per cent. of the electors within a given district.

Mandamus will lie only where there is a plain dereliction of duty upon the part of public officers, and can never be invoked to control discretion which is being exercised in good faith, and with the sole view to public welfare. *State, ex rel, v. Commissioners*, 36 O. S., 326.

The action of a board of education may be controlled by mandamus in proper cases. *State, ex rel, v. Board*, 35 O. S., 368; *State, ex rel, v. Board*, 27 O. S., 96.

It is unfortunate that a statute of such importance should be so loosely drawn as to give rise to the questions here presented, but the court is not inclined to deny to the electors of a given district the right which seems to be granted by the statute, when more than seventy-five per cent. petition for the transfer of certain property.

The court, in this case, is not concerned with what will be the ultimate effect of such transfer. It is possible it may be entirely nullified by the refusal of the members of the two boards, in

their subsequent proceedings, which each must pass, which may not be controlled by mandamus.

The Attorney-General is of the opinion that the provision for a vote of the two boards modifies the mandatory provision of the statute requiring the county board to make the transfer, and that therefore the provisions of the entire statute are directory, and not mandatory.

The court is inclined to the view that the provision for the initial step, and the submission of the question to the two boards, is mandatory when seventy-five per cent. or more of the electors have filed a petition; otherwise, the Legislature is put in the position of offering an advantage in one breath, and withdrawing it in the next. The demurrer will be overruled.

PROCEDURE IN THE MUNICIPAL COURT.

Common Pleas Court of Hamilton County.

CARRIE HAMILTON V. CHARLES B. RATTERMANN ET AL.

Decided, June 4, 1916.

Construction of the Act Relating to Procedure in the Municipal Court of Cincinnati—Determined by Jurisdiction Previous to Establishment of that Court.

Under the act creating the municipal court of Cincinnati, Sections 9 and 28, providing the procedure which shall govern that court should be so construed as to give effect to both. In all actions in which justices of the peace had exclusive jurisdiction, the procedure governing justices courts applies; in cases in which the justices of the peace and the court of common pleas had concurring jurisdiction, the procedure applicable to either applies; and in cases formerly exclusively within the jurisdiction of the common pleas court, the procedure in that court applies.

H. P. Karch, for plaintiff in error.

E. R. Gwinner and *G. A. Dornette*, contra.

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Hamilton v. Ratterman et al.

MAY, J.

This is a proceeding in error to reverse a judgment of the municipal court refusing to set aside an order confirming a sale and ordering distribution of the proceeds brought into that court in a sale upon execution levied upon personal property of the judgment debtor.

The plaintiff below sued for \$97.58 and recovered a judgment for \$95.50. After judgment, execution was issued and the return shows that the writ was levied upon one Winton Six touring car, seven passenger, and it was sold under execution in conformity with the law.

The plaintiff in error, the defendant below, contends that because there was no advertisement published in a newspaper in accordance with Section 11668, G. C., the sale was invalid.

The act creating the municipal court of Cincinnati (103 O. L., 19), provides that that court shall be a court of record. Section 11668 provides that there shall be no sale of goods and chattels by virtue of an execution issued by a court of record unless notice shall be given by advertisement in a newspaper printed in the county at least ten days before the day of sale.

If there is nothing in the act creating the municipal court of Cincinnati contrary to the provisions of Section 11668, the sale is invalid.

“In the actions and proceedings of which the municipal court act expressly provides that the procedure of the justice court shall govern.”

Section 9, as found in 103 O. L., page 282, provides:

“In the actions and proceedings of which the municipal court has jurisdiction, all laws conferring jurisdictions upon a court of common pleas, a police court or a justice of the peace, given such court or officer power * * * prescribing the force and effect of their judgments, orders or decrees, and authorizing or directing the execution or enforcement thereof, shall be held to extend to the municipal court, unless inconsistent with this act or plainly inapplicable.”

It is admitted that the proper notice, as required under the justice court act, Section 10427, G. C., was complied with, to-wit:

“All property taken in execution * * * shall be advertised for sale at four of the most public places within the township where it was seized, at least ten days before the time appointed for such sale.”

Counsel for plaintiff in error, however, contends under Section 28 of the municipal court act, the provisions of Section 11668 apply.

Under the decision of the court of appeals, *In Re Hesse*, 24 C.C.(N.S.), 249, affirmed, *In re Hesse*, 93 Ohio St., 230, the seeming conflict between Sections 9 and 28 must be harmonized so that both be upheld, if possible.

The policy of the Legislature in creating the municipal court was to have a swift and cheap determination of smaller causes. The Legislature must certainly have had in mind to have the provisions in force in the justice court apply, as far as possible, to the municipal court and, as the statute says, said provision shall apply unless inconsistent with this act or plainly inapplicable.

Being therefore of the opinion that the provisions of Section 10427, G. C., are not inconsistent with the municipal court act, and inasmuch as they are expressly made applicable thereto, and as they have been complied with in the sale of the property upon execution in that court, there is no error in the proceedings. It seems that the proper rule of construction be as follows: In all cases where the claim of the plaintiff is for less than \$100, the rules applicable to proceedings before a justice of the peace apply; in all cases in which the plaintiff seeks to recover for claims between \$100 and \$300, the procedure before either the justice of the peace or the court of common pleas applies; and in all cases involving sums of money in excess of \$300, the procedure before the court of common pleas applies.

For these reasons the judgment below will be affirmed.

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Emmes v. Nielen & Co.

AUTHORITY TO FIX SALARIES IN COUNTY OFFICES.

Common Pleas Court of Henry County.

COUNTY COMMISSIONERS OF HENRY COUNTY v. G. E. RAFFERTY,
AS COUNTY AUDITOR, AND FRANK C. FISK,
AS COUNTY TREASURER.

Decided, 1916.

County Salary Act—County Commissioners Fix the Aggregate Compensation to be Paid in the Several County Offices—But the Heads of Said Offices Fix Individual Salaries.

County commissioners are without power to fix the compensation of deputies and assistant clerks of county auditor, treasurer, probate judge and recorder. The authority to fix such compensation is vested in these several officers, with the limitation that the aggregate compensation to be paid in each office shall not exceed the amount allowed by the county commissioners for such offices.

SMITH, J.

In the case of the Board of County Commissioners of Henry County, Ohio, against G. E. Rafferty as county auditor and Frank C. Fisk as county treasurer, the matter is before this court on a general demurrer to the petition, raising the question as to whether or not the petition states facts sufficient to entitle the plaintiff to the relief prayed for.

Omitting the formal parts, the petition states the following relevant facts:

On or prior to November 20th, 1915, the defendants, said county auditor and the county treasurer, and the probate judge and the recorder of said county, each filed with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employees of their respective offices for the year beginning January next after the filing of such statement, together

with a sworn statement of the amount expended by them for such assistants for the preceding year, such statements having been filed as required by Section 2980 of the General Code of Ohio.

Said auditor set forth in his statement filed as aforesaid, that the sum of \$960 would be necessary to pay his first deputy, the sum of \$720 would be necessary to pay his second deputy, and the sum of \$600 as the probable amount necessary to pay his clerk and other deputies, all of which amounts aggregated \$2,280. Thereafter the plaintiff made an aggregate allowance of \$900 to be expended for the compensation of said auditor's first deputy, to be paid in monthly installments of \$75 each.

Said treasurer set forth in his statement filed as aforesaid, that the sum of \$900 would be necessary to pay his deputy, and the sum of \$360 would be necessary to pay his assistant, which amounts aggregate \$1,260. Thereafter the plaintiff made an aggregate allowance of \$840 to be expended for the compensation of said treasurer's deputy, to be paid in monthly installments of \$70 each.

Said probate judge set forth in his statement, filed as aforesaid, that the sum of \$720 would be necessary to pay his deputy. Thereafter the plaintiff made an aggregate allowance of \$600 to be expended for the compensation of said probate judge's deputy to be paid in monthly installments of \$50 each.

Said recorder set forth in his statement, filed as aforesaid, that the sum of \$480 would be necessary to pay his deputy and that the sum of \$50 would be necessary to pay his clerk hire. Thereafter the plaintiff made an aggregate allowance of \$420 to be expended for the compensation of said recorder's deputy to be paid in monthly installments of \$35 each.

The plaintiff further states in the petition that each of said officers has disregarded the orders of the plaintiff as heretofore stated, and is paying monthly salaries in excess of those fixed by the plaintiff; that said auditor issues his warrants to such deputies for such monthly salaries in excess of those fixed by the plaintiff and said treasurer pays such warrants.

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The plaintiff prays that the defendants may be enjoined from issuing and paying warrants in excess of the various salaries as fixed by the plaintiff as aforesaid.

The demurrer to the petition raises the question as to the authority of the county commissioners to fix the compensation of the deputies and assistants of the county auditor, treasurer, probate judge and recorder.

The case of *State of Ohio, ex rel Onie B. Mason, v. Rafferty, Auditor of Henry County, Ohio*, No. 9030, in this court, presents the identical question as that raised in this case. In that case, on a state of facts the same as those heretofore mentioned, the plaintiff, who was the recorder's deputy, brought suit to compel the auditor to issue a warrant to her for a compensation of \$50 per month, which was the compensation fixed by the county recorder. The defendant auditor set up that the compensation for such deputy fixed by the recorder was in excess of the monthly salary fixed by the commissioners when they fixed the aggregate sum to be expended for the compensation of such recorder's deputies. That case was decided by Judge Scott, now of the Williams county court of common pleas, and the plaintiff was granted a writ of mandamus, the defendant auditor thus being ordered to issue a warrant for the salary fixed by the county recorder which was greater than that fixed by the county commissioners. No written opinion was filed in that case, but the decision was necessarily rendered on the principle that the county officers have authority to fix the compensation of their deputies, and that the county commissioners have no jurisdiction to fix such compensation.

The solution of the question presented in this case depends upon the proper construction of Sections 2980, 2980-1 and 2981 of the General Code of Ohio. The issue being one as to the powers of the county commissioners, it becomes necessary to inquire whether or not such power has been vested in them by statute, for the commissioners have only such powers as are given them by statutory law.

“The board of county commissioners can exercise only such powers as are conferred upon them by law.” *State, ex rel, v. Yeatman*, 22 O. S., 546, at page 551; *Comrs. of Medina County v. Leighty*, 1 C.C.(N.S.), 431; *Comrs. of Mahoning County v. Railway Co.*, 45 O. S., 401, at page 403.

Said Section 2980 provides for the report of various county officers as to the probable amounts necessary to be expended for deputies, assistants, etc., and the amount expended for that purpose for the preceding year. Said section also provides that the county commissioners shall fix an aggregate sum to be expended by such county officers for that purpose during the succeeding year.

Section 2980-1, as amended in 106 Ohio Laws, page 14, provides maximums which may be allowed by the commissioners for said purpose, and for the application to the court of common pleas in case any officer requires an additional allowance for the compensation of his deputies. Said section also provides that in case the term of any officer expires within the year for which such aggregate sum is fixed, the county commissioners shall designate what parts of this aggregate sum shall be expended by the out-going and in-coming officials.

Section 2981 is as follows:

“Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employees for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employee shall be paid monthly from the county treasury upon the warrant of the county auditor.”

As has heretofore been stated the only question presented for the consideration of the court in this case is as to the authority of the various county officers to fix the compensation of their deputies. If such officers have authority to fix such compensa-

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tion, then the decision should be in favor of the defendants and their demurrer should be sustained. If, on the other hand, the county commissioners have authority to fix the compensation of the deputies of these officers, then these officers have been exceeding their authority, and the injunction prayed for in the case should be granted.

The part of said Section 2981 which relates to the controversy here is as follows:

“Such officers may appoint and employ necessary deputies * * * for their respective offices, fix their compensation and discharge them.”

It is a fundamental rule of construction of statutes that where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning. Courts should interpret the laws as they exist and not read into them something not intended by the Legislature to suit the fancy or whim of the court or any other parties.

“Where a statute is plain and unambiguous it construes itself, and whether its provisions are wise or equitable, courts have no authority, by judicial construction, to read anything into or out of it. *Fronce v. Nichols*, 22 O. C. C., 539.”

“When the language of a statute is not only plain but admits of but one meaning the task of interpretation can not be said to arise. *Columbus v. Board of Elections*, 13 O. D. (N. P.), 452.”

“If a statute is specific in its provisions and is constitutional, the question of its wisdom is for the Legislature and not for the courts. *State, ex rel, v. Kohler*, 11 O. N. P. (N. S.), 497.”

“Plain and explicit language can not be construed contrary to the express words on conjecture. *Hathaway's Will*, 4 O. S., 383.”

It is the opinion of this court that the plain and explicit words of this statute give authority to the various county officers to fix the compensation of their deputies.

This Section 2981 took effect in substantially its present form on January 1st, 1907. The case of *Theobald v. State of Ohio, ex rel*, reported in 10 O.C.C.(N.S.), at page 175, was decided by the Circuit Court of Montgomery County in July, 1907, this decision being rendered after said Section 2981 went into effect. At page 181 the following language is used by Judge Wilson, concurring in the opinion of Judge Smith:

“It must not be overlooked that the officer fixes the compensation of each particular employee, as well as the number of employees. With that the board has nothing to do, save that it may limit the aggregate that may be thus expended.”

It is also a fundamental rule relating to the construction of statutes, that if possible such construction should be placed upon the statute that full force and effect may be given to all parts thereof.

A further provision of the section is that such compensation shall not exceed in the aggregate for such office the amount fixed by the commissioners for such office. That is the provision to which reference was made in this case of *Theobald v. State of Ohio, ex rel*. Then the statute further provides that when so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employee shall be paid monthly from the county treasury upon the warrant of the county auditor.

The contention is made by the plaintiff that the use of the word “monthly” in the latter part of this section, gives the plaintiff authority to fix the compensation of the deputies of the officers mentioned in the petition in this case.

Webster’s International Dictionary defines the word monthly as being “Once a month; within each month.” It is evident that by substituting the definition of the term monthly in place of the word monthly, there is no inconsistency with the opinion already indicated by this court. Making that substitution, the last sentence of this section would read as follows, “When so fixed, the compensation of each duly appointed or employed

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deputy, assistant, bookkeeper, clerk and other employee shall be paid once a month," or "within each month upon the warrant of the county auditor." It appears to the court that the plaintiff is trying to read into this statute such interpretation as would make it read: "That such compensation shall be paid in equal monthly installments." But in view of all of the rules of construction of statutes heretofore cited, the court is of the opinion that such a construction should not be read into this statute by the courts.

The Legislature has plainly said, in so many words, that such officers may appoint and employ deputies and assistants, fix their compensation and discharge them; and if this court were to read into the latter part of this section that this aggregate sum should be paid in equal monthly installments, such a construction would abrogate and nullify the plain provision of the statute reading that such officers may fix the compensation of their deputies.

So the decision of this court is that this demurrer is well taken and will be sustained, and the plaintiff not desiring to plead further, the plaintiff's petition is dismissed at its costs, to all of which the plaintiff excepts generally.

**EXCLUSION OF STOCKHOLDERS FROM PART OF THEIR
INTEREST IN STOCK.**

Common Pleas Court of Hamilton County.

A. CLIFFORD SHINKLE ET AL V. THE DALTON ADDING MACHINE
COMPANY OF OHIO ET AL.

Decided, July 24, 1916.

*Corporations—Right to Vote Stock in an Ohio Corporation a Property
Right—Exclusion of Stockholders from Right to Vote Deprives
Them of a Property Right—And Affords Ground for Constructive
Service—Section 11292.*

1. The stock of an Ohio corporation is property within this state. The right to vote that stock is a property right. And where a petition recites that the non-resident defendants, having contracted away this right, are now seeking to derogate from their own grant by refusing to abide by the contract, the cause of action stated in the petition is one relating to property within this state, and where it is sought by the action to exclude the non-resident defendants from voting the stock, the action is one to exclude the defendants partly from an interest in property in this state, and service by publication may be had upon the non-resident defendants under the provisions of paragraph 9 of Section 11292, General Code.
2. Service of summons can not be had upon the president of a corporation which is not a resident of Ohio nor doing business in this state.

*Stephens, Lincoln & Stephens and Peck, Shaffer & Peck, for
the motions.*

Ernst, Cassatt & Cottle, contra.

GEOGHEGAN, J.

Heard on motions to quash service of summons.

This matter came on for hearing on the motions of Thomas A. Banning, Harry Y. Mengel and Dalton Adding Machine Company, a corporation under the laws of Missouri, defendants

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herein, to set aside the sheriff's warrant of service of summons and that the service be quashed. The motions of Banning and Mengel involve the same proposition, and therefore will be considered together.

The petition herein recites in detail a certain contract whereby Dalton Adding Machine Company of Missouri and James L. Dalton agreed with George Eustis & Company, a partnership of Cincinnati, Ohio, to transfer all the assets of Dalton Adding Machine Company of Missouri, to a corporation to be formed under the laws of Ohio, to be known as the Dalton Adding Machine Company, and it was provided in said agreement that the directors of said Ohio corporation should consist of eleven members and that the holders of the Ohio corporation's preferred stock should be entitled to designate six persons of said board for each year, for five successive years, after the organization of said corporation. It further recites that in accordance with the terms of said contract certain proceedings were had, the effect of which was the retirement from business of the Missouri corporation and the transfer of its business to the Ohio corporation and the acquirement of a plant for the conduct of the business of the Ohio corporation, in the course of which 13,855 shares were issued to three persons, of whom James L. Dalton was one, as trustee for the Dalton Adding Machine Company of Missouri; that the said three persons subsequently attempted and pretended to transfer the 13,855 shares of common stock to Griff Glover, Thomas A. Banning and H. Y. Mengel, as trustees for said Dalton Adding Machine Company of Missouri, and that said three individuals, ever since said time, have held said stock, and that prior to the first annual meeting of the Ohio corporation the said James L. Dalton, said Dalton Adding Machine Company of Missouri and the said Griff Glover, Thomas A. Banning and H. Y. Mengel, trustees for the Missouri corporation, conspired to violate and repudiate that portion of the contract by which the preferred stockholders, as successors to the rights of Eustis & Company under such contract, were entitled to designate six directors of the Dalton Adding Machine Com-

pany of Ohio; that at the meeting held for the purpose of electing directors, the preferred stockholders designated six persons to act as directors, but that said James L. Dalton ruled that said preferred stockholders were not entitled to designate six directors and that the said preferred stockholders having called upon the common stockholders to vote for said six persons and elect them directors in accordance with said contract, the said common stockholders refused so to do, and being largely in the majority, voted for persons to serve as directors who were not all of the six that had been designated by the preferred stockholders, as claimed under the contract.

The petition further recites that at the next meeting of the stockholders, the said holders of the common stock, the defendants herein, will disregard, ignore and avoid the contract and refuse to accept or be bound by the designation of the preferred stockholders aforesaid. The prayer is that the defendants be enjoined from denying the preferred stockholders their right to designate six members of the board of directors, from interfering with them in the exercise of their right, from failing or refusing to recognize the said six directors to be designated by the preferred stockholders, and that the Dalton Adding Machine Company of Ohio be enjoined from receiving or counting the votes of stockholders other than the preferred stockholders for six members of the board of directors other than those designated by the preferred stockholders, and that the defendants and each of them be required to permit the preferred stockholders to designate and elect six members to the board of directors thereof at the next annual meeting and at each election during the remainder of the term of said agreement.

The defendants, Banning and Mengel, filed separate motions to set aside and quash this service on the ground that the present action is not one of those specified in Section 11292, General Code. I have had occasion to examine the provisions of said section in the case of *Doepke v. Christy Box Car Loader Company et al*, 14 N.P.(N.S.), 523, and after a careful examination of the briefs of counsel submitted upon this motion and a careful

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reading of all the authorities cited therein, I am unable to see any substantial difference between that case and the case at bar. In that case I pointed out the distinction between actions *in personam*, actions *in rem* and actions *quasi in rem*, and held that in the last two cases substituted service may be had under the provisions of Section 11292, General Code.

The service herein upon the defendants, Banning and Mengel, was sought to be obtained under the provisions of paragraph 9 of said section, which is as follows:

“In an action which relates to, or the subject of which is real or personal property in this state, when the defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein and such defendant is not a resident of this state, or is a foreign corporation, or his place of residence can not be ascertained.”

It must be conceded that if this action comes within the provisions of paragraph 9, the constructive service herein upon the defendants, Banning and Mengel, is good. If it does not, the constructive service should be set aside, and I have come to the conclusion that inasmuch as the relief demanded in this case consists in partly excluding the defendants, Banning and Mengel, from their interest in the stock of an Ohio corporation, that they may be brought into this action by constructive service, under the section of the code above referred to.

I must confess that the case has not been without difficulty, but an examination of the authorities will convince one that the stock of an Ohio corporation is property within this state; that one of the interests that a stockholder has in that property is the right to vote that stock, and that itself is a property right; and that inasmuch as the petition recites that these objecting defendants have contracted away this right and are now seeking to derogate from their own grant by refusing to abide by the contract, the cause of action stated in the petition is one wherein the action relates to property within this state, and it is sought

by the action to exclude the defendants partly from an interest therein.

I have also examined the provisions of the act of the Legislature relating to the transfer of stock certificates found in 102 Ohio Laws, page 500, now known as Section 8673-1 *et seq.*, General Code of Ohio, and find nothing in that act that would justify the conclusion that the Legislature had intended to deprive the courts of Ohio from exercising jurisdiction over stock in Ohio corporations in proper actions where the holders of those stocks were non-residents, but have come to the conclusion that I expressed upon the oral argument of this matter, that the best that can be said for said act is that its primary object and intent is to protect the rights of innocent purchasers for value. It can not be assumed that the Legislature of Ohio would pass an act which would deprive the courts of this state from exercising control over the stock of corporations in this state in an action between the residents of this state and non-resident holders of said stock, when the action otherwise might be conceded to be entirely within the jurisdiction of these courts.

Whatever questions may arise as to the legality of this contract under the laws relating to corporations in Ohio, the matter can not be considered here. Our code does not expressly make the question as to whether or not constructive service may be had dependent upon whether or not a cause of action is stated in the petition. I can not agree with the reasoning in *Hinch v. d'Utassy*, 1 Ohio Dec., N. P., 373, which holds that a motion to quash service must necessarily be in the nature of a demurrer to the petition. The court in that case seems to ignore the fact that the Legislature in framing the section has used the disjunctive "or" in providing the circumstances under which in actions relating to property in this state, constructive service may be had. I think it is sufficient under the statute, if the claim of the petition is sufficient to bring the action under the provisions of Section 11292, General Code, and to determine the sufficiency of a pleading on a motion to quash where the defendant enters

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a special appearance for the motion only, is forcing a construction of the statute beyond its original intent and purpose.

The motions of Banning and Mengel will therefore be overruled.

As to the motion of the Dalton Adding Machine Company of Missouri, I think it is well taken. The service is made upon James L. Dalton, president, but it appears that the said company is not a resident of Ohio, nor is it doing any business in this state, nor has it a managing agent here; therefore, a service upon its president under such circumstances would not be sufficient to bring it within the jurisdiction of the court. *Goode v. Druggist Assn.*, 3 O. L. R., 600; *Gibbon v. Ohio Coal Co.*, Cincinnati Superior Court, 75; *Fleckmeier v. Commercial Wheel Company*, 7 N. P., 613; *St. Clair v. Cox*, 106 U. S., 350; *Conley v. Alkali Works*, 190 U. S., 406.

**INJUNCTION AGAINST EMISSION OF OFFENSIVE ODORS
BY A REDUCTION PLANT.**

Superior Court of Cincinnati.

JOHN STORY V. THE UNION REDUCTION COMPANY.*

Decided, February 13, 1915.

*Nuisance—Reduction Company Enjoined from Emitting Offensive Odors
—But Execution of Its Contracts Can Not be Interfered With.*

A reduction company which is engaged in collecting and disposing of garbage under a contract entered into with a city under authority of law (General Code, Sections 3809, 3649) and which creates a nuisance by the manner in which it operates its plant, can not

*Affirmed, *Story v. Union Reduction Co.*, 25 C.C.(N.S.), 533; motion to require the Court of Appeals to certify its judgment in this case overruled by the Supreme Court, May 29, 1916.

be enjoined from continuing to carry out the contract, but will be enjoined from continuing the nuisance.

Thomas H. Kelley, for plaintiff.

Peck, Shaffer & Peck and *Healy, Ferris & McAvoy*, contra.

PUGH, J.

John Story, the plaintiff, at the time this action was brought and for many years before and ever since lived at No. 4062 Liston avenue in the city of Cincinnati, something less than one-half mile east of the point at which the works of the defendant, the Union Reduction Company, are located. This company is engaged in the business of reducing or rendering animal and vegetable offal and garbage, converting the raw material into fertilizer and extracting the oils and greases.

The plaintiff complains that the defendant company is and has been carrying on its business in such a way as to create a nuisance by discharging into the atmosphere noisome and offensive gases and smoke to such an extent and so frequently repeated that it has become injurious to his health, property and comfort. The alleged nuisance is laid, with a continuendo, from June 1st, 1913, up to date, and the court is asked to enjoin the further carrying on of the business or, at least, enjoin its being carried on in such a way that it will continue to be a nuisance.

The defendant denies that it is or has been creating a nuisance by the manner in which it carries on business, and claims that it has built and improved its plant in the most scientific and approved way, has installed the most effective deodorizing devices and that it is neither possible nor necessary to do anything more.

1. The Union Reduction Company is operating under a contract with the city of Cincinnati by which it gathers up and disposes of the animal and vegetable refuse—garbage—of the entire city. This contract the city is authorized to make by the laws of this state (General Code, Sections 3809, 3649). In doing this work, it is, in effect, exercising a municipal function, authorized by law, and, even if there resulted what would otherwise

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constitute a nuisance, this court has no power to prevent the defendant from continuing such work as long as it keeps within the terms of the law and the contract. (*The Toledo Disposal Co. v. The State of Ohio*, 89 Ohio State, 230.)

2. There is nothing in the law or the contract, however, which authorizes the defendant to carry on its work in such a manner as to create a nuisance. Indeed, it is expressly stipulated in the contract with the city that it shall employ such a process "that is not offensive or noisome in its operation." If the process used or the manner of operation creates a condition of affairs which is recognized by a court of equity as one which should be enjoined at the instance of this plaintiff, the injunction should issue.

3. There is a great mass of testimony in this case—much of it impossible to reconcile—and the court can not undertake to discuss it in detail. The ultimate finding of fact is as follows:

(a) That, at certain times, a nuisance is created by the way in which the defendant's plant is operated.

(b) That the nuisance is of such a nature and of such frequent repetition that it is continuous and is a serious injury to the comfort, health and property of individuals and of the public.

(c) That, in the case of the plaintiff, although residing nearly one-half mile east of the plant, there is special injury to his comfort and property, if not to his health as distinguished and different in kind from the injury inflicted upon the general public.

(d) That the nuisance thus created and maintained is of the kind which calls for the interference of a court of equity, by way of injunction.

4. The court has endeavored unsuccessfully to locate the exact cause of the nuisance, even to the extent of interrogating experts and personally inspecting the defendant's plant and its mode of operation.

The testimony of the experts is to the effect that the devices in use at the defendant's plant ought to eliminate all "carry-

ing" odors—which are the only ones which affect this plaintiff and with which we are here concerned. On the other hand, the evidence shows that such odors are not eliminated.

Whether the experts are mistaken or whether there is carelessness in the operation of the plant; whether there is a difference in the odors at times dependent upon the nature of the material that is being rendered; whether, at times, the plant is operated without the use of the deodorizing devices provided, are questions the court is unable to answer from the evidence and personal inspection.

The injunction, therefore, that will be issued must be necessarily general in its terms, and the defendant will be compelled at its peril to operate its plant within the general limits prescribed.

An injunction, as prayed for, will issue enjoining the defendant from continuing to operate its plant in such manner as to create noisome and offensive odors to the injury of the plaintiff in health, comfort or property.

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LIEN OF A NON-RESIDENT VENDEE OF MACHINERY.

Common Pleas Court of Hamilton County.

SKINNER ENGINE CO. V. METROPOLE CAFE CO. ET AL.

Decided, 1916.

Liens—Rights of a Foreign Creditor Who Has Sold and Installed Machinery—Retention of Title in Himself Not a Bar to Enforcement of Mechanic's Lien—Failure of Non-Resident Creditor to Enter Appearance in Receivership Proceedings Not Prejudicial to His Rights.

1. A non-resident creditor for machinery and materials and the labor required in their installation, who has complied with the requirements of Section 8308, General Code, for the perfection of his lien, is not estopped from enforcing said lien by a specific provision in the contract of sale that the title should remain in the seller and should retain its personal character until fully paid for.
2. Failure on the part of a non-resident creditor to enter his appearance in a receivership proceeding, or to take any action with reference to orders entered in such proceeding, does not deprive him of his lien or other rights arising thereunder.

Henry T. Hunt and B. L. Heidingsfeld, for plaintiff.
Horstman & Horstman, contra.

MAY, J.

The plaintiff filed its petition setting up two causes of action—first one upon an account for furnishing an engine and for doing work necessary for the installation of the same; and, second, action for the foreclosure of a mechanic's lien. Two of the defendants, to-wit, George W. Martin and Joseph C. Thoms, each filed answers and cross-petitions to the plaintiff's petition.

At the hearing the plaintiff asked leave to dismiss its first cause of action and to so amend the prayer in its second cause of action that it should read:

“Plaintiff therefore asks that the plaintiff may be held by the court to have the first and best lien upon the work, labor, materials and machinery hereinbefore described, and that in default

of payment of the claim due to the plaintiff that the work, labor, materials and machinery hereinbefore described may be sold and the proceeds thereof applied to the indebtedness due plaintiff, and for all proper relief.”

At the hearing the following facts were proved:

That on July 26, 1912, the Metropole Cafe Company, *per* Emil G. Schmitt, its president and manager, entered into written contract with the plaintiff, the Skinner Engine Company, by the terms of which the plaintiff company was to furnish and install two engines, generators, switchboard, cables, concrete foundations for the generating sets, heater and pump, and do all the other necessary work for the proper carrying out of the contract; that the contract price was \$8,964, and the contract provided the terms upon which payment should be made; that among the conditions contained in the contract were the following:

“The title to the machinery or material we furnish remains in us until full purchase price hereunder (including any modifications or extension of payments, whether evidenced by notes or otherwise) shall have been fully paid in cash, and you are to do all acts necessary to perfect and maintain such retention of title in us.”

And also:

“It is understood that the machinery hereunder shall retain its personal character and shall not become a fixture by being placed in any building, or in any manner whatsoever annexed to any land. Further, that if said machinery is placed upon mortgaged or encumbered premises it shall be without prejudice to our retention of title thereto as herein provided.”

The work began on December 12, 1912; the last work done under the contract was April 14, 1913; on February 12, 1913, defendant company paid \$1,500; on June 10, 1913, it paid \$429.82; on June 24, 1913, the switchboard called for under the contract was furnished by the defendant company and an allowance made on the contract of \$1,000; on July 10, 1913, \$400 was paid. At that time there was due under the contract \$5,664. Sometime in July 1913, the Metropole Cafe Company went into the hands

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of a receiver, appointed by the court of insolvency, in the case of *Carpenter v. Metropole Cafe Company et al*, No. 6695; on August 14, 1913, a mechanic's lien was filed in the office of the recorder against the Metropole Cafe Company; the receiver appointed in that suit took an order of court for the sale of all the property of the Metropole Cafe Company, and the same was purchased by George W. Martin on December 19, 1914, and George W. Martin and Joseph C. Thoms are now the owners of the leasehold.

It was further proved at the hearing that the Skinner Engine Company was made a party to the suit in the insolvency court, but that no service was made upon the Skinner Engine Company either personally or by publication, and the Skinner Engine Company made no appearance at all, either personally or by attorney, in the suit in the insolvency court. The fee of the property upon which the Metropole Cafe Company erected the Metropole Hotel is in Joseph C. Thoms. The Metropole Company merely had a lease on the same. The lessor, Thoms, reserved a lien for rent in his lease, but said lease was not placed upon record until after the work contracted for by the Metropole Cafe Company had been completed.

The defendants contend in this case that the plaintiff is not entitled to enforce its mechanic's lien for two reasons:

First, they claim that the work done by the plaintiff, to-wit, the work, labor, materials and machinery, were personalty by the very terms of the contract between the Metropole Cafe Company and the Skinner Engine Company, and therefore was not attached to and did not become a constituent part of the leasehold of the premises; and, second, that the failure of the plaintiff to enter its appearance in the receivership suit in the insolvency court and to assert its lien there and the sale under the order of that court of the leasehold and all the assets of the company without objection on the part of the plaintiff, deprives the plaintiff of any right to set up its lien at this time.

In my opinion, this latter reason advanced by the defendants in their behalf is not well taken.

The defendants rely upon the case of *Lindemann v. Ingham*, 36 Ohio St., 1, where it was held that an assignee of a mortgage

in possession of goods has a right to sell the property and that a person having a chattel mortgage on the property must work out his rights against the funds. There is no doubt about this proposition of law, but in that case it will be noticed that the chattel mortgagee was a party and therefore was bound by the orders of the court.

Judge Okey says, p. 14, referring to the case of *Dwyer v. Garlough*, 31 Ohio St., 158:

“The statute contains no express provision for notice to the mortgagee of the proceedings to sell. Notice in some form was essential. *Ray v. Norseworthy*, 23 Wall., 128. Whether this requirement is satisfied by the public notice given, we need not determine. The facts set forth in the statement of the case tend to show not only notice to the defendants in error, but consent on their part that Lindemann should dispose of the property as assignee.’

In the receivership case, there is no statute providing how the receiver should proceed. It is elementary law that no one can be deprived of his lien, if he has a valid lien, unless he has been properly brought into the case or voluntarily appears.

An attempt was made to bring in the Skinner Engine Company, but no valid service was had.

The Supreme Court of the United States, in the case of *Ray v. Norseworthy*, 90 U. S. (23 Wall.), 128, cited by Judge Okey in the Lindemann case, held:

“Although district courts of the United States, sitting in bankruptcy, have power to order a sale of the real estate of the bankrupt which he has mortgaged, in such a way as to discharge it of all liens, and although as a general thing, if they order a sale so that the purchaser shall take a title so discharged the purchaser will have a title wholly unincumbered, yet to pass in this way an unincumbered title of property previously mortgaged, it is indispensable that the mortgagee have notice of the purpose of the court to make such an order; or that in some other way he have the power to be heard, in order that he may show why the sale should not have the effect of discharging his lien. And if a sale be made, without any notice to him, his mortgage is not discharged.”

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The defendants claim that the receivership proceedings are notice to the world.

This is not the law in this state, especially as far as foreign creditors are concerned. The plaintiff in this case was a foreign corporation; it had no legal notice of the receivership proceedings, and at the hearing no evidence even tending to prove that the plaintiff company had such notice was offered. For these reasons, I am of the opinion that the failure on the part of the plaintiff to enter its appearance in the receivership proceedings, or any action taken in pursuance of any orders made in the receivership proceedings, are ineffective to deprive the plaintiff of any rights it may have in the matter.

The more serious question in this case, however, is, whether the plaintiff has a mechanic's lien upon the work, labor, materials and machinery furnished by it under the contract. If it has such a lien under the statute, all the necessary steps required by the statute have been complied with and the lien is a valid one. The question depends solely upon the construction of the statute taken in connection with the contract entered into between the parties.

Section 8308, General Code, provides:

“Every person who does work or labor upon or furnishes machinery, material * * * for constructing, altering, or repairing a boat * * * or for erecting * * * a house, mill, manufactory, * * * or other building, appurtenance, fixture, bridge, or other structure, * * * by virtue of a contract, express or implied with the owner, part owner or lessee, of any interest in real estate, * * * shall have a lien to secure payment thereof upon such boat, * * * or upon such house, mill, manufactory, furnace, or other building, or appurtenance, fixture, bridge, or other structure, * * * and upon the material or machinery so furnished, and upon the interest, leasehold or otherwise, of the owner, part owner, or lessee in the lot or land upon which they may stand, or to which they may be removed.”

In order to construe properly this statute, it is necessary to consider its history. In the section as originally adopted and as it then read, the words “and upon the material or ma-

chinery so furnished," were not a part of the statute. These words first appear in the amendment of 1889 (86 O. L., 373), and from that date to the present day they have been incorporated and are a part of the statute.

The Legislature must have had some purpose in adding these words to the statute, and it was so held by our own court of appeals, in *Rule v. Automobile News Co.*, *Court Index*, August 4, 1915; this case expressly decides this point and holds that there may be a lien upon personalty. This same point was also decided by the United States Court of Appeals for this circuit, in *Kinsey v. Heckerman*, 224 Fed. Rep., 308, in which all the Ohio cases on this statute are reviewed.

In 2 *Jones, Liens* (3d Ed.), Section 1343, it is said:

"In a building intended to be used as a hotel, everything of a permanent character attached to it, and reasonably necessary for the purpose of its use as a hotel, is a fixture for which a lien attaches. Thus, the heating, laundry, and cooking apparatus, including a large soup kettle, furnished as a part of the building in its original construction or subsequent repair, and necessary for its use as a hotel, is a fixture for which a mechanic's lien attaches." Citing *Dimmick v. Cook*, 115 Pa. St., 573, 580; and *Siegmund v. Kellogg Co.*, 38 Ind. App., 95.

It seems that our Supreme Court, even before the amendment to the statute above referred to, was of the opinion that there could be a mechanic's lien on personalty under the statute.

In *Hart v. Iron Works*, 37 Ohio St., 75, the court said at page 77:

"The assignee claims, however, that this is an attempt on the part of the Globe Iron Works to obtain a mechanic's lien on personal property. But the lien may be asserted as well against a leasehold, a chattel interest, as against real estate (*Choteau v. Thompson*, 2 Ohio St., 114; *Dutro v. Wilson*, 4 Ohio St., 101); and where a mechanic agrees with one in possession as tenant of real estate, under a lease like this, to furnish machinery and attach it to a building on the leased premises, to be used by such tenant in carrying on manufacturing in the building, such machinery, when so attached, becomes so much of a part of the leasehold that the mechanic's lien will extend to the machinery."

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See also *Pflueger v. Foundry & Mach. Co.*, 134 Fed. Rep., 28; *Meador v. Egan Co.*, 109 Fed. Rep., 632.

But it is urged by the defendants that the two conditions in the contract of sale, to-wit, that the title was to remain in the plaintiff company until paid for, and that in no event was it to be considered a fixture, estopped the plaintiff from asserting its claim by virtue of a mechanic's lien.

If it be considered as personalty, this objection is not well taken, for the reasons just given, namely, that under the statute such a lien is permitted; and the other objection, the retention of title, is also not well taken. See 2 *Jones, Liens* (3d Ed.), Section 1340:

“A provision in a contract for furnishing machinery, that the same shall remain the property of the vendor until paid for, does not prevent such machinery from becoming fixtures when attached as such to a mill, nor does it prevent the vendor from enforcing a lien for the same.” Citing *Case Mfg. Co. v. Smith*, 40 Fed. Rep., 339; a decision by the late Mr. Justice Jackson; *Cooper v. Cleghorn*, 50 Wis., 113; *Warner Elevator Mfg. Co. v. Building & L. Assn.*, 127 Mich., 323.

The defendants further contend that if the lien is sustained, that it ought not extend to the two panel switchboard and appurtenances, which were not furnished by plaintiff and by reason thereof an allowance of \$1,000 was made on the bill.

This contention is probably well taken, and the furthest extent to which the plaintiff is entitled to assert its lien is on the actual materials and machinery furnished by it.

A decree in accordance with this opinion may be drawn.

SUMMONS NECESSARY ON CROSS-PETITION IN DIVORCE PROCEEDING.

Court of Common Pleas for Clark County.

ANNA E. BARGDILL v. LE ROY O. BARGDILL.

Decided, November, 1915.

Divorce and Alimony—Plaintiff in Action for Alimony—Entitled to Service of Summons on Cross-Petition Asking for a Divorce—Statutes Relating to Divorce Distinguished from those Relating to Civil Procedure.

Where a plaintiff has filed a petition for alimony, and the defendant has filed an answer and cross-petition seeking divorce from the plaintiff, the case can not be heard upon such cross-petition for divorce until summons has been had thereon and the statutory period of six weeks has elapsed. *Young v. Young*, 9 Bull., 24, not followed.

Johnson & Miller, for plaintiff.

J. B. Malone, contra.

GEIGER, J.

On July 2d, 1915, the plaintiff filed her petition against the defendant, asking that the court decree her reasonable alimony. The plaintiff does not ask for a divorce. Upon the filing of this petition, a summons was issued and personally served upon the defendant, together with a certified copy of the petition.

On August 10th, 1915, defendant filed an answer and cross-petition, setting up various charges against the wife, and praying he might be divorced from the plaintiff. Both plaintiff and defendant are residents of Clark county.

Upon this cross-petition no summons was issued. The defendant is urging that the case come to trial, but the plaintiff objects that the cause can not be heard by the court until after the issue of summons upon the cross-petition and service of the same upon the plaintiff.

This calls for an examination of several sections of the statutes and the meager decisions of the courts in relation thereto.

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Section 11983, G. C., provides that when the defendant is a resident of this state, the clerk shall issue a summons directed to the sheriff of the county in which he or she resides or is found, which, together with a copy of the petition, shall be served on him or her at least six weeks before the hearing of the cause.

Section 11985 provides that the cause may be heard and decided after the expiration of six weeks from the service of summons, or the first publication of notice.

Section 11986 provides that if the plaintiff fails to appear, or having appeared, admits or denies the allegations, the court may hear and determine the case.

Section 11997 provides that when the wife files her petition for divorce or alimony, the husband may file a cross-petition for divorce.

It is claimed, upon the part of the plaintiff, that before the cause can be heard upon the cross-petition of the defendant, the service of summons must be made upon the plaintiff, and that six weeks shall have expired after said service.

It is claimed on behalf of the defendant that Section 11997 gives him the right to file his cross-petition for divorce, and that the plaintiff being already in court upon her petition, that it is not necessary for the defendant to cause summons to be issued, and that the cause may proceed to hearing upon the defendant's cross-petition for divorce without reference to the statutes which relate to the issuing of service upon a petition, or which provide that the cause shall not be heard until after the expiration of six weeks from the service of summons.

The defendant's position is strongly sustained in the case of *Young v. Young* (8 Ohio Dec., Reprint, 575; 9 Bull., 24), where it is held by Judge Buchwalter, of the Common Pleas Court of Hamilton County, that the plaintiff in a divorce and alimony case is not entitled to a continuance on the ground that no summons has been issued and served on the defendant's cross-petition asking for a divorce, as no summons need be issued on such cross-petition. The judge says no authority has been cited upon the question, and states that the practice at the Hamilton

county bar has been to issue summons, but that the judges have made no specific ruling upon this question, and that if it were a civil case under the code, no summons would be required upon the cross-petition against the plaintiff.

The court holds when a party plaintiff files a petition against another, the plaintiff is presumed, in law and reason, to have knowledge of all subsequent proceedings in that case, and must look to the record to show the defendant's cross-petition, as well as his answer, and the court therefore holds, as a rule of practice, that a defendant cross-petitioner in divorce and alimony proceeding need not issue summons thereon for the plaintiff.

This case seems to have been decided, not upon authorities cited to the judge, but upon the analogy which may exist between divorce cases and cases under the civil code.

The case of *Harter v. Harter*, 5 Ohio, 319, arose upon facts in substance as follows: The petitioner resided in one county and the defendant in another. A petition was filed in the county in which the plaintiff resided, and a summons was issued directed to the sheriff of the county in which the defendant resided, which was by him served and returned, and there was no other notice of the pendency of the petition, and no copy of the petition was delivered to the defendant. The court says in part, "perhaps there is no statute in Ohio more abused than the statute concerning divorce and alimony. Perhaps there is no statute under which greater imposition is practiced upon the court and more injustice done to individuals." * * * The judge then gives expression to views that seem highly pertinent to the present-day divorce proceedings, and says: "Aware of these circumstances, * * * we have ever been disposed to give a strict construction to the law and not to hear a case unless the applicant brings himself or herself within both the letter and spirit of the statute." The court then continues the case for notice, for the reason that the notice given did not strictly comply with the statute.

A short paragraph is found in the proceedings of the Supreme Court, at a term held in Cincinnati in 1845, Ohio Dec., Reprint,

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Vol. 1, 135. The statement of the court is brief, but seems to be highly pertinent:

“*Ferrell v. Ferrell*. Divorce. Defendant lives in Clark county, Ohio. His counsel acknowledged service more than six weeks before the term, and filed his answer. *Held*: That the statute requiring either personal service or advertisement is peremptory and can not be dispensed with.”

In the case of *Smith v. Smith*, Wright's Report, 643, decided in 1834, it is held where a bill for divorce is amended, there must be service. The appearance and waiver will not be received.

The case possibly does not quite support the syllabus. The court says there has been no service since the amended bill, nor appearance, while the syllabus says there must be service.

In Volume 1, Dayton Term Reports, at page 11, Kumler, Judge, says:

“Service in a divorce case by voluntary entry of appearance by the defendant, is not good. Such service is collusive upon its face and against public policy. The manner of service pointed out by the statute must be followed.” Citing 5692 R. S., 11983 G. C.

In the case of *Keenan v. Keenan*, 5 N.P.(N.S.), 12, it is held that a decree of divorce granted on a supplemental answer and cross-petition, of which the plaintiff had no notice, while it may serve to terminate the marriage contract, does not determine the rights either as to alimony or the custody of children.

Judge Kyle, on page 14, says that any action of the court based upon such supplemental bill, without notice, would be a proceeding wherein the defendant did not have her day in court, and the judgment would extend no further than a proceeding *in rem*, which might have jurisdiction, *which is not here determined*, to annul the marriage contract.

The court, in the above case, especially disclaims that he is determining that a divorce can be granted upon a cross-petition upon which there has been no service.

The case of *Heyler v. Heyler*, 7 N. P., 609, holds that a hearing can not be had before the expiration of full six weeks after the service of summons, or the first publication of notice.

The case of *Search v. Search*, 7 N.P.(N.S.), 274, holds that the statute in reference to the service of summons must be strictly followed in divorce cases.

The case of *Bay v. Bay*, 85 O. S., 417, holds that where the husband obtains a decree of divorce by fraud, the decree dissolving the marriage relation is conclusive, but where the court did not have jurisdiction of the wife's person, she may have said decree opened so far as relates to her interest in her husband's property. The case shows that the sections in reference to service must be strictly followed.

The cases above cited clearly indicate that divorce statutes should be strictly construed; that there is a distinct difference between these statutes and statutes relating to civil procedure. If it is true that the court has no jurisdiction to hear a divorce case when the defendant comes into court and enters his appearance through his attorney and files an answer, then it is clear there is a vital distinction between a divorce case and other civil cases.

As stated in the case in 5 Ohio, 319, it is necessary that the parties bring themselves within both the letter and the spirit of the statute. The matter of divorce is not entirely within the control of the parties to the proceeding, but the state has its interest in the proceeding which must be protected by a close adherence to the statutory provisions.

Section 11985 provides that a case may be heard and decided after the expiration of six weeks from the service of summons, or the first publication of notice. It can not be heard before that time, nor can it be heard unless there is a service of summons or publication of notice. This is probably for a definite reason. In the ordinary civil case, parties might come into court and consent that their case be heard without the service of summons, and without the expiration of any time, but this is impossible in a divorce case. If it is impossible to hear a divorce case upon the petition of the plaintiff without a strict compliance with

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the formalities, and expiration of a given length of time, does Section 11997, which simply provides that a husband may file a cross-petition, permit a hearing upon such cross-petition without service of summons, and without the expiration of any time after said cross-petition may be filed? It is not hard to conceive that the public is interested in the fact that this six weeks shall expire after the filing of a petition or a cross-petition for divorce, before the parties shall be heard. It is well known that a lapse of time often brings parties who are temporarily estranged again into harmony, and a delay of six weeks is not subversive of the interests of the parties and in a measure protects the interests of the state.

If, as claimed by the defendant, no service is necessary upon the cross-petition, then no time need elapse between its filing and the hearing. A wife seeking alimony, as in this case, may upon the hearing be confronted with a cross-petition for divorce, filed by the husband, and hastened into a trial without the intervention of time which might solve the domestic difficulty.

For the reasons above stated, and on the authority of the cases above cited, the court can not agree with the opinion of Judge Buchwalter, in the case of *Young v. Young*, 9 Bull., 24; 8 Ohio Dec. Reprint, 575.

The case will therefore be continued for service upon the defendant's cross-petition.

SERVICE BY MUNICIPAL COURT ON NON-RESIDENT OF TOWNSHIP.

Common Pleas Court of Hamilton County.

ELIHU SNIDER ET AL V. A. C. SHOCKEY.

Decided, July 7, 1916.

Service of Summons—Validity of Personal Service Issued by the Municipal Court of Cincinnati Against a Non-Resident of Cincinnati Township.

Under the provisions of the act creating the municipal court of the city of Cincinnati (103 Ohio Laws, 279), the said municipal court

has jurisdiction to entertain an action brought against a non-resident of the city of Cincinnati when service is made upon him personally in said city and it is error for said court under such circumstances to grant a motion to quash the service so made.

Nelson & Hickenlooper, for plaintiffs in error.

O. F. Dwyer, for defendant in error.

GEOGHEGAN, J.

Error to the Municipal Court of Cincinnati.

The action below was for the sum of \$180 with interest from May 15, 1915. The defendant was served with summons personally. A motion was made to quash the summons on the ground that the defendant was not sued in the township in which he was a resident householder and the court sustained said motion and made the following order:

“The court finds that the defendant was personally served with summons in this cause at 15 East Third street, within the city of Cincinnati, Cincinnati township, but that he was at that time a resident householder of the city of Norwood, Columbia township, Hamilton, county, Ohio. The court therefore finds said motion well taken and doth sustain the same. Wherefore it is considered that this case be and the same is hereby dismissed at costs of plaintiffs.”

To this order plaintiffs excepted and to the judgment of dismissal plaintiffs are now prosecuting error in this court.

The only question submitted for determination is, whether or not the provisions of the act creating the municipal court of the city of Cincinnati, 103 Ohio Laws, 279, give jurisdiction to that court to entertain an action brought against a non-resident of Cincinnati township when service is made upon him personally in Cincinnati township.

In case No. 161203 on the dockets of this court, Carrie Hamilton, plaintiff in error, vs Charles B. Ratterman, etc., defendant in error, his Honor, Judge May, held:

“Under the act creating the municipal court of the city of Cincinnati, Sections 9 and 28, providing the procedure which shall govern the municipal court, should be construed so that

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both be given effect. In all actions of which justices of the peace had exclusive jurisdiction, the procedure governing the justice court applies; in cases in which the justice court and the common pleas court had concurrent jurisdiction, the procedure applicable to either applies; and in cases formerly exclusively within the jurisdiction of the court of common pleas, the procedure in that court applies."

It would seem, therefore, that inasmuch as service may be made upon the defendant in an action brought in the common pleas court if the defendant be found in the county, irrespective of his place of residence, it follows that under the provisions of Section 9 of the municipal court act the service of summons upon the defendant herein was good, inasmuch as that section provides that all laws conferring jurisdiction upon a court of common pleas shall be held to extend to the municipal court unless inconsistent with the act or plainly inapplicable. Furthermore, Section 6 of the same act provides, in sub-section 2 thereof, that the municipal court shall have jurisdiction "in all actions and proceedings for the recovery of money or personal property of which the court of common pleas has, or may be given jurisdiction, when the amount claimed by any party, or the alleged value of the personal property sought to be recovered, does not exceed \$600," etc.

As the act itself does not specifically provide that the jurisdiction of the municipal court shall extend only to residents of Cincinnati, there does not seem to be any inconsistency in applying the rule as to service of summons laid down in Section 11277, General Code.

The contention of counsel for defendant that it was not the intention of the Legislature in establishing the municipal court of Cincinnati to vest said court with power to decide controversies in which the defendant is a non-resident of the city of Cincinnati, for the reason that citizens of townships outside of the city have no part in selecting the council of the city of Cincinnati, who are authorized to provide by ordinance for the summoning of jurors to the municipal court, is not persuasive. It has not been my understanding that it has been the policy of

the Legislature to provide that defendants should have the right to have their cases tried by juries consisting of their own neighbors and friends. The days of the jury of the vicinage, where the jurors were also witnesses, have long since passed out as a part of our system of jurisprudence. In fact, an examination of the various laws with reference to the jurisdiction of courts and the service of summons will show that it has been the policy of the Legislature to permit actions to be brought against defendants wherever they may be found, except in actions which are strictly local in their nature. The municipal court of the city of Cincinnati is a court of record. It has been raised to a dignity that is beyond that of the justice of the peace for the township. The citizens of the city of Cincinnati are taxed to pay the expenses of this court, which are considerably greater than they were when there were justices of the peace for Cincinnati township, and it seems to be the better reasoning that the Legislature intended that the city of Cincinnati should have a court that up to a certain jurisdictional amount would be able to relieve the common pleas court by dispensing of a number of cases which would otherwise have to be disposed of in that court.

Therefore, I am of the opinion that the municipal court erred in sustaining the motion to quash the summons, and the judgment of the municipal court will therefore be reversed and the cause remanded for proceedings consistent herewith.

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**TOOLS AND IMPLEMENTS FURNISHED ON THE ORDER
OF A SUB-CONTRACTOR.**

Common Pleas Court of Hamilton County.

WILLIAM L. CONNELL, v. THE PITTSBURG, CINCINNATI, CHICAGO &
ST. LOUIS RAILWAY COMPANY ET AL.

Decided, July 28, 1916.

*Liens—Steam Shovel Furnished to a Railway Sub-Contractor—Engaged
in "Stripping" a Gravel Pit—Burden on Head Contractor to Show
Payment in Full Prior to Notice.*

1. A sub-contractor engaged in stripping the surface soil of a tract of land for the purpose of preparing the ground to be used as a gravel pit, from which gravel is to be taken to be used as ballast in the construction and repair of railway tracks, is engaged in furnishing labor and material for and in the construction of a railroad, and a person who rents a steam shovel to such sub-contractor to be used in said work is a person who furnishes tools and implements on the order of a sub-contractor for his use, and is entitled to a lien under the provisions of Section 8351, General Code.
2. In a contest between the head contractor and the person furnishing the steam shovel, the burden is upon the head contractor to show that prior to the notice of lien he had paid to the sub-contractor all moneys due said sub-contractor under the contract.
3. Whether said payment in full by the head contractor to the sub-contractor would defeat the lien of the person furnishing the steam shovel, *quaere*.

Herrlinger & Dixon, for plaintiff.*Victor Heintz*, for the defendant, Wise.*Maxwell & Ramsey* and *Joseph S. Graydon*, for the railway company.

GEOGHEGAN, J.

This is an action brought by William L. Connell against the railway company to enforce a lien under the provisions of Section 8351, General Code. The facts are as follows;

The defendant, Wise, had a contract with the railway company to strip the upper surface of the earth over a certain gravel pit of the railway company at Terrace Park. One Watts was a sub-contractor under him, and the plaintiff, Connell, furnished to the said Watts an automatic steam shovel to be used upon a portion of the work that had been sublet to Watts. The purpose for which the work was being done was to remove the earth that covered the gravel, and the testimony of the railway company's engineer is that the railway company intended to operate this gravel pit for the purpose of obtaining ballast for its tracks between Cincinnati and Columbus. The railway company has in its possession the sum of \$1,933, which it has retained from the amount due Wise, in order to cover the claim of Connell in case it should be determined that Connell has a lien under the statute.

The questions for determination are, first, whether under the circumstances Connell has a lien under the provisions of Section 8351, General Code; and, second, whether or not the burden is upon Connell to prove that there is due Watts from Wise any sum of money on account of the sub-contract of Wise, in order to enforce the lien.

As to the first proposition, the court is of the opinion that under the provisions of Section 8351, Wise has a lien. It is conceded by counsel for Wise that when Connell rented his steam shovel to Watts, he was a person who furnished tools and implements on the order of a sub-contractor for his use, and the only question is whether or not Watts at the time was furnishing materials and labor for or in the construction of a railroad. Counsel for Wise contends that inasmuch as it is conceded that Watts was merely stripping the surface soil for the purpose of preparing the ground to take out the gravel, that he was not furnishing material or labor in the construction of a railroad. I can not agree with this contention. It is necessary in the proper construction and maintenance of a railroad that gravel be used; that is the form of ballast commonly in use in this section of the country, and it is the custom of railroad companies, and especially of the railway company defendant herein, as

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testified to by its engineer, to maintain at points along the various divisions gravel pits, so that this ballast may be obtained. It is also necessary in this section of the country, in order to obtain clean gravel, that the surface of earth above the gravel be stripped. Now, it would seem to be an extraordinary construction of the lien law to hold that while a man might have a lien, under the present circumstances, if the contract were for the taking out of gravel, he would not have a lien where the contract was for the doing that which is absolutely necessary in order to get the gravel. I am unwilling to adopt such a narrow construction.

Therefore, I am of the opinion that Watts was engaged in furnishing labor and material for and in the construction of a railroad, and inasmuch as Connell furnished him with a tool or implement for his use in said work, Connell comes within the provisions of Section 8351.

I am supported in this view as to what constitutes the construction of a railroad by *Railway Co. v. Brown*, 14 Kan., 557, wherein the late Justice Brewer, of the Supreme Court of the United States, then a judge of the Supreme Court of Kansas, held in determining a question arising under the lien law in that state similar to the one we have here involved, that a lien might attach for additional construction of side-tracks, filling up of holes, widening the right-of-way, etc., even though the road construction had long been completed. And by *Railroad Company v. McConnell*, 25 Kan., 370, in an opinion by Judge Valentine, in which Justice Brewer concurred, wherein it was held that the removal of an old bridge and the construction of a new bridge is such a construction of a part of the railroad company's road within the meaning of the lien statute. And the same view seems to be held in *Dean v. Rannels et al*, 12 Indiana App., 97.

As to the second proposition, I am of the opinion that when Connell proved his contract with Watts for the use of the machine and the amount that was due him, coupled with the admission of the railroad company that it was retaining a sum sufficient to cover the claim of Connell, that the burden rested on Wise to go forward and show that he had paid Watts all that

was due him under the contract, and I say this independently of any question of whether or not his ability to show this would have made him successful in resisting Connell's claim of lien.

I am not sure that a general construction of the provisions of the General Code relating to liens of the character claimed here will result in the conclusion that a lien against a fund is to be defeated by a showing on the part of the head contractor that he has paid the sub-contractor all that is due him, where it is shown that the affidavit has been duly filed and recorded and the notice required by the statute given. Whatever may be the rule in regard to that, I do not feel that it is necessary for me to discuss it here. No attempt was made by Wise to offer any evidence that he had paid Watts everything that was due him, although he pleads the fact of payment in his answer filed herein. It always has been my understanding that wherever payment is pleaded, no matter in what kind of an action, the burden is upon him who pleads it to prove it, and that his merely pleading payment raises no presumption in his favor. In fact, in the case of *Rudd v. Davis*, 1 Hill (New York), 277, the Supreme Court held that in an action by a plaintiff who claimed a lien and showed a substantial performance of the contractor's agreement with the owner, that this was *prima facie* sufficient to show that he was entitled to recover, and if the fact be otherwise the onus of proving it is on the defendant.

Therefore, as it is admitted that Connell did furnish the steam shovel, and that Watts was a sub-contractor under Wise, and that Wise had a contract with the railroad company, and that the railroad company is now withholding from Wise a sum sufficient to cover Connell's lien, the presumption that that arises in Connell's favor would be sufficient to allow him to recover, even though it might be held that under the statute no lien can attach if the contractor has paid the sub-contractor in full for his services, a point which I distinctively do not undertake to determine here.

Therefore, judgment will be given for the plaintiff, but inasmuch as the case has resolved itself into a contest between Wise and Connell for the possession of a fund in the hands of

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the railroad company, interest will not be allowed upon the sum claimed.

INSURANCE.

Common Pleas Court of Ashtabula County.

THE OHIO MUTUAL SAVINGS & LOAN COMPANY v. JOHN
WANDA ET AL.

Decided, 1915.

Fire Insurance—Validity of Clauses against Alienation of Title—Policy Invalidated by Conveyance by Husband to Wife of an Undivided Interest in the Property Insured.

A policy of fire insurance, containing a clause against alienation of title or interest without the consent of the company, is invalidated by the conveyance by a husband to his wife of an undivided one-half interest in the property insured without securing the consent of the company thereto, where the marriage of the couple occurred subsequent to the issuance of the said policy; and in an action for recovery under such policy the insurance company is entitled to judgment on the pleadings.

ROBERTS, J.

A motion has been made in this case for a judgment upon the pleadings, so far as the issues are concerned between John and Rosa Wanda upon one side, and the insurance company upon the other; there being no dispute upon the proposition involved in this motion, which is that subsequent to the issuance of the insurance policy by the company to John Wanda he, by deed, conveyed an undivided one-half interest in the property to Rosa Wanda, who became his wife at or about the time of the conveyance to her. The insurance company was not advised of this conveyance, nor did it endorse any consent thereto on the insurance policy.

A determination of this motion involves a single proposition of law, and that is, whether, under the terms of this policy and the agreed conditions involving the conduct of the parties, the

policy becomes void so far as the insurance company is concerned, and I will not attempt to elaborate an opinion upon this motion. The determination of what the law is upon this single proposition will determine what disposition should be made of the motion.

The commendable industry of counsel has resulted in the collection of a large number of authorities, many of which have been cited in argument, and to which it will not be necessary to now refer, further than inasmuch as what is now being said is taken by the stenographer, I would like to suggest these authorities which have been cited, for the reason that the collection will be further valuable upon other occasions when this question may arise.

Counsel for the insurance company, in support of the motion, have cited and commented upon 65 O. S., page 157, and from the opinion in the case, page 163; 2 *Clement on Insurance*, page 152, rule 7; 86 Maryland, 130-145; 21 Florida, 399; 158 Pennsylvania, 459-461; 69 O. S., 136; 36 O. S., 608; 51 Conn., 251; 48 O. S., 533; 1 C. C., 79.

Counsel for the Wandas have cited 17 Iowa, 176-185; 40 Iowa, 551-553; 48 O. S., 534; 19 Cyc., 742.

The authorities cited upon the respective sides tend to support the contentions upon those sides, and, still, there is not an utter lack of harmony between them. I wish to call attention, for a moment, to this 48 O. S., page 534, which, it is said, cites with approval the 40 Iowa, with the suggestion that the difference in the decisions in the cases cited is largely the result in the difference in the wording in the clause with regard to alienation of the title in the different insurance policies. In 48 O. S., which was a case that held that the insurance was good unless there was an alienation of the entire title, it is said by the court, after citing a number of authorities which are in conflict with the decision:

“An examination of the cases above cited will disclose that the conditions in the policies, where forfeiture for alienation was sustained, were materially different from the one involved in this action, except perhaps in the cases in 30 Penn St., 311, and that

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in 16 Wisc., 523, where the language of the condition was very similar to that now under consideration. In the other cases sustaining the forfeiture, the condition contained a provision forfeiting the policy, not merely for a 'sale or transfer' of the property, but in case of 'a change of title' or the sale of 'any undivided interest therein.' "

And farther on it is said:

"Let us recur to the exact words of forfeiture as they are set forth in the defendant's answer. 'If * * * said assured should sell or transfer the property thereby insured, that said policy should become null and void.' It was competent for the policy to provide, expressly, that a sale of a part of the property or of an interest therein should avoid the policy; this they did not do. The absence of a specific provision to that effect when it could have been so easily inserted, together with the rule before referred to that conditions which defeat a policy should be construed strictly against the forfeiture, leads us to hold that a sale of the entire interest of the party insured was necessary to avoid the policy."

Undoubtedly, the language used in insurance policies, with regard to forfeiture or change of title, is largely the result of decisions upon that subject from year to year, and here was a situation where a part only of the title had been transferred, and the court held that the insurance was good. The court, however, threw out the suggestion that insurance companies might very easily contract in such a way as to protect themselves against a partial alienation of the title, or change in the title, by expressly providing against liability under those conditions. Taking advantage of that suggestion, policies were subsequently issued, so worded as to take advantage of the idea suggested by the court, and it is somewhat interesting to trace the history of this change in the wording of the policy in that respect, and I want to read a little from 13 Am. & Eng. Enc., commencing on page 239:

"By reason of the development of the clauses not contained in all policies of insurance, the decisions construing the older forms of policies are not of equal applicability, but their force

depends largely upon the effect of the conditions involved in each particular case. But it is also true that the older decisions have in fact exercised an influence in many cases upon the construction of later phraseology somewhat greater than their intrinsic applicability to the language of later policies would warrant. The desire of courts to avoid forfeitures and to construe provisions therefor strongly against the insurer has in part brought this about; in part, also, it has been caused by the natural tendency of courts to construe new forms of policies as nearly as possible like older ones. This influence of earlier decisions is especially marked in the judicial interpretation of the alienation clause. In connection with it, an acquaintance with the older decisions and the reasons on which they rest is essential.

“As the earlier policies contained no condition against alienation, the courts were called upon to lay down certain principles as to the effect of alienation *per se*, which have greatly influenced the construction of conditions against alienation. The contract of fire insurance being one of indemnity and depending upon and requiring an interest on the part of the insured, it is evident that when that interest has been terminated by alienation, no loss can be suffered by the insured, and he needs no indemnity. Hence a total transfer of the interest of the insured must defeat the insurance, because otherwise, if recovery might be had on the policy after a complete transfer of interest, the contract would not be one of indemnity, but would amount to a wager whether the property would be lost or injured by fire. Nor would it be consistent with the theory of the fire-insurance contract to permit the alienee to recover in such a case. As has been said, the contract is personal; not the thing, but the interest of a person in the thing insured. Therefore, independently of any conditions in the policy, a transfer of the entire interest of the insured must terminate the insurance unless the insurer, by consenting to the transfer or otherwise, agrees to insure the transferee. If the whole interest of the insured has terminated, the insurance becomes inoperative by reason of the nature of the contract, and no condition to that effect is required.

“A mere change in the interest of the insured, however, stands on a different basis. There being no condition against this in the policy, a transfer that falls short of terminating the entire interest of the insured will not avoid the insurance as to the interest remaining, since, as far as that interest extends, the insured may suffer a loss, and may therefore be indemnified. Hence, after a transfer or alienation not divesting the insured of his whole interest, he remains insured to the extent of the interest

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retained, in the absence of contrary conditions in the policy. The title must be absolutely divested in order to terminate the insurance, in the absence of conditions against change of interest. Any legal or equitable interest remaining in the insured, even the smallest, will be protected by the insurance to the extent of such interest.

“It is manifest that the rule just stated, while protecting the insured, is liable to work injury to insurers, who, though willing to insure an entire and absolute title, might consider an equitable or contingent interest remaining in the insured after conveyance too hazardous a risk. Consequently, underwriters very soon began to insert conditions in policies to meet such cases.

“It would hardly seem necessary to say that such conditions are reasonable, in accord with public policy, and valid, and the courts have so held.

“Where the policy is conditioned to be avoided by alienation or change of title or interest, without the consent of the insurer, a breach of the condition terminates the insurance without any formal act or declaration of forfeiture. The condition may be waived, but omission to declare a forfeiture will not constitute a waiver.

“The condition against alienation has had many forms, and the details must be considered in each case in order to determine the applicability of a particular decision. Careful attention to this will remove most of the apparent conflicts in the cases. The various forms used are referable to three general types. At first the condition appears, variously expressed, as a prohibition of ‘sale,’ ‘transfer,’ or ‘alienation.’ This condition, having been construed to refer to an absolute and entire alienation, failed to meet the requirement, and ‘change of title’ was added to one or more of the former words. The courts generally held that only a voluntary alienation or change of title was intended, so that this form of the condition was soon supplemented by the words ‘whether by legal process or judicial decree, or by voluntary conveyance,’ or similar language. But this form did not provide for the more important matter of change of interest, whence the present clause forbidding any ‘change in title, interest, or possession.’

“Conditions against ‘sale,’ ‘transfer,’ or ‘alienation,’ where ‘change’ of interest is not forbidden, are strictly construed, and, in the light of the decisions as to the effect of alienation in the absence of conditions, are held to refer only to an absolute transfer of the entire interest of the insured, completely divesting him of rights in the property. Any sale or transfer falling short of

this which leaves him any interest that may be covered by the insurance is held not to be within the purview of the condition as to the interest remaining.”

So the general rule seems to be declared that simply a general provision, which was the case in the 40 Iowa, and also in the 48 O. S., does not avoid the policy, or a transfer of an interest only, in the title; but his text which I have read, and the reasoning indulged in in the 48 O. S., clearly indicate that parties have a right to contract in an insurance policy providing against liability in case of a change of title, and that, when such contract is made, it is valid.

I will say that I wanted to suggest several other authorities which have been cited, or collected in the consideration of this matter.

In the 1 C. C. Rep., page 79, is a decision by our own circuit court. The cause of action arose in an adjoining county. This was a case where a man by the name of Hall, in the town of Coalburg, was the owner of a stock of goods. He procured insurance upon the goods, subsequently sold an undivided one-half interest, as I remember the facts, to some one who sold to some one else, and finally the ownership of the whole stock came back to Hall, when the property was destroyed by fire. The court held that the insurer was entitled to recover. One of the partners at one time, was a man by the name of Kuntz, I think. In the opinion it is said:

“There is no doubt that when Hall sold to Kuntz there was an entire change of ownership. Neither was owner of any distinct part, but they were joint owners, and during the time of joint ownership, neither company would have been liable in case of loss.”

In the 20 Fed. Rep., page 657, the syllabus reads:

“The sale or transmutation of the various interests between partners themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy; but the introduction of a new partner, with an investiture of an interest in him which he did not have before, *does* invalidate the policy.

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“And where the insurance is upon a single building, and the conveyance is of an undivided interest only, the conveyance avoids the whole policy, notwithstanding the interest of the insured remaining unconveyed is shown to exceed in value the sum insured.”

The 6 C. C. Rep. (New Series), page 132, is also cited.

As I have before suggested, a consideration of these cases indicates that the rule is very general and but little, if any, conflict actually exists in the decisions. The different conclusions arrived at by different courts are largely the result of different wordings of the alienation clause in the policies under construction, and the rule seems to be clearly established and generally recognized that a transfer or conveyance of an interest in the property only, where there is such a clause against transfer and against change in title or ownership, as is admittedly contained in the policy involved in this action, avoids the policy. It is true that such a conclusion involves hardship upon the insured and upon people insuring generally, for the reason that the ordinary person is not familiar with the terms of the policy which he accepts. People do not appreciate the importance of knowing what contracts they are making, or do not understand that they are endangering the protection of their policies by making transfers of their title, or selling interests, or encumbering the property, and people frequently, with the best of intentions, and without actually affecting the moral hazard or increasing the risk, invalidate their contracts, and lose the protection which they supposed they had in their insurance policy. But, on the other hand, insurance companies engaged in the business of indemnifying against loss by fire, as a business proposition, have a right to say under what conditions and circumstances they will agree to be responsible in case of a loss. These contracts of insurance are construed as any other contract, and when the insured accepts a policy, makes a contract with the company in which he expressly agrees that he will not be entitled to recover if he does certain things, and then does those things, there is no other proper course except to construe the contract as it was made by the parties, and this court must recognize the contract which the parties made as con-

strued by the courts, and it necessarily follows that the motion must be sustained in this case.

**HOIST CAPABLE OF CARRYING BUT A SINGLE PASSENGER
NOT A PASSENGER ELEVATOR.**

Common Pleas Court of Hamilton County.

**WILLIAM F. RAY V. THE STANDARD ACCIDENT INSURANCE
COMPANY.**

Decided, July 27, 1916.

Accident Insurance—Double Indemnity Not Recoverable—Where Injury Occurs While Riding on a Hand Hoist—Such a Device Not a Passenger Elevator.

1. A hand hoist or lift erected for the sole purpose of transporting the officers and employees of a corporation from floor to floor, where the platform of said hand hoist or lift is thirty inches or less square, making it impossible for anyone save the operator thereof to stand thereon, and where the person who desires to use said lift is required to operate it by means of a hand rope, and where it is impossible for the operator to carry anyone upon said lift as a passenger with him, is not a passenger elevator within the terms of a policy of accident insurance providing for double indemnity if the assured be injured while a passenger in or upon a public conveyance provided by a common carrier for passenger service or while in a passenger elevator.
2. In an action to recover double indemnity by the administrator of one who was injured while riding upon such a lift the right to so recover double indemnity will not be allowed.

*Vincent H. Beckman and Thomas H. Morrow, for plaintiff.
Robertson & Buchwalter and B. S. Oppenheimer, contra.*

GEOGHEGAN, J.

This is an action brought to recover double indemnity upon a policy of accident insurance. The facts upon which this case is to be decided are stated in the second defense to the answer

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as amended by stipulation of counsel. The second defense is as follows:

“For a second defense defendant reaffirms the allegations hereinbefore contained, and avers further that the policy of accident insurance issued to plaintiff contained among its provisions the following:

“Article 4. The amounts specified in articles one, two and three shall be doubled if the insured is injured under the following circumstances, to-wit: while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps or running-board of railway or street railway cars), or while in a passenger elevator (elevators in mines excepted).

“Defendant further avers that at the time when plaintiff was injured as alleged in the petition, he was upon a hand hoist or lift, descending to the ground or first floor of the grain elevator of the Clifton Springs Distilling Company, of which company plaintiff is the general manager; that said hand hoist or lift was erected for the sole purpose of carrying the millwright who had charge of the machinery in said grain elevator; that the platform of said hand hoist or lift was thirty inches or less square, making it impossible for anyone save the operator thereof to stand thereon; that the person who desired to go up or down upon said lift (in this instance the plaintiff), was required himself to operate it by means of a hand rope made fast at the top and bottom of the frame of said lift, and that it was impossible for the operator to carry anyone upon said lift as a passenger with him; that the injury of which plaintiff complains was suffered by reason of a fall from the platform of said hand hoist or lift, and not while he was in or upon any passenger elevator, or while he was a passenger upon any such elevator, as is alleged in said petition.”

The stipulation between counsel in the case recites that the answer may be amended to conform with the facts preliminary to submission of the cause to the court, by substituting for the words,

“That said hand hoist or lift was erected for the sole purpose of the millwright, who had charge of the machinery in said grain elevator.”

the following words:

“That said hand hoist or lift was erected for the sole purpose

of transporting the officers and employees of said company from floor to floor.”

It will be seen that the sole question in dispute between the parties is whether or not under the provisions of Article 4, quoted above, the plaintiff is entitled to double indemnity, and as I take it, this depends entirely upon whether or not the hand hoist or lift described in the answer is a passenger elevator. This is indeed a case of first impression. I have examined all the authorities that have been submitted by counsel in the very thorough briefs which they prepared for the assistance of the court, and if I am to apply the rule laid down in *Standard Life and Accident Insurance Co. v. McNulty*, 177 Fed., 224 (C. C. A., Eighth Circuit, November 16, 1907), I would be constrained to say that a hand hoist or lift, such as is described in the answer, is not a passenger elevator. In that case the court lays down the following rule for the construction of contracts of insurance:

“Agreements of insurance are to be construed like other contracts, according to the sense and meaning of the terms which the parties use, taken in their plain or popular sense.”

Now the use of elevators in large cities has become so common that when one speaks of a passenger elevator he is ordinarily understood to mean an elevator designed strictly for the carriage of passengers; that is, primarily designed for the purpose of carrying persons in large buildings who are tenants thereof, or persons having occasion to resort to such buildings for the purpose of carrying on or transacting matters of business. And, when one speaks of a hand hoist such as has been described in the answer, he is ordinarily not understood as referring to a passenger elevator. Especially is this true when the said hoist or lift, as is described in the answer, is merely designed for the purpose of carrying a single person who may have occasion to use it in and about his ordinary daily avocation.

The authorities do not throw much light on the subject under discussion. There were a number of cases cited, most of which, however, had to do with the construction of language in insur-

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ance policies relating to passenger trains and conveyances. Except in so far as the general propositions of construction therein laid down are concerned, they are not of much assistance to the court in this matter.

Counsel for the defendant advances the theory that the word passenger elevator means public elevator, and that therefore the provision for double indemnity is made because of the extremely high degree of care which is required of him who operates it, and that the stringent liability which the law imposes upon such a carrier justifies the insurance company in providing for double indemnity where the accident occurs upon this class of conveyances and under such circumstances as would, aside from the question of contributory negligence, result in the enforcement of that liability upon the carrier. But I hesitate to adopt this as a reason for giving a construction to this contract such as I have hereinbefore given and prefer to place it upon the single ground that a hand hoist or lift is not in a popular sense a passenger elevator.

I must confess that this matter has not been without considerable difficulty to me, and if it were a question of whether or not any indemnity could be recovered at all under the policy, I would be inclined to adopt the strict rule that wherever there is any doubt in the matter, that doubt should be resolved strictly in favor of the insured, but as was pointed out by Judge McPherson in *Depue v. Traveler's Insurance Co.*, 166 Fed., 183, the law has been undergoing a change in so far as the question of double indemnity is concerned, and that while it is still the law that if the language in the policy is fairly capable of a construction favorable to the insured, this will be given, although the clause provides for a double indemnity, nevertheless, the court must presume that in so far as double indemnity is concerned the parties had a special risk in view and the court will endeavor to carry out their intention.

Now in face of the meager facts that are at hand for the decision of this case, how can it be fairly construed that the parties to this contract in providing that double indemnity should

be paid for injuries sustained in a passenger elevator, intended that these should apply to a hand hoist or lift that was used primarily in the ordinary course of business to carry a single employee from floor to floor while engaged in and about his work?

Our own Supreme Court in the case of *New Amsterdam Casualty Co. v. Johnson, Administratrix*, 91 Ohio St., 155, seems to have adopted the rule of popular construction of contracts of accident insurance, for in discussing a death which occurred by reason of dilation of the heart following a cold plunge and holding that that was not an accidental death, the court says, at page 160:

“While the views of the laity can not in the very nature of things be the controlling gauge wherewith to measure doubtful legal propositions, yet, it might be suggested that the average business man were the question involved in this case submitted to him, would in all likelihood be surprised if not shocked to learn that it had been held that an injury of the character suffered by the defendant in error should be followed by the payment of indemnity by a strictly accident insurance company.”

So, I say here, that if the question as to whether or not the hoist described herein is a passenger elevator be submitted to the average man, I feel confident in saying that he would immediately respond that such elevator was not the kind of passenger elevator as was contemplated by the parties to this contract, and that the passenger elevator contemplated was the kind of elevator that one ordinarily meets with in the various buildings and stores of the community.

Therefore, I am of the opinion that double indemnity should not be allowed in this case, and the judgment will be entered in conformity with these findings upon the pleadings as they are now made up.

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**CONDEMNATION OF PROPERTY FOR THE PURPOSE OF
EXTENDING A STREET.**

Common Pleas Court of Hamilton County.

LAURA B. MCFARLAN V. CITY OF NORWOOD ET AL.*

Decided, 1916.

Municipal Corporations—Appropriation of Property for a Street Extension is a Public Improvement—Resolution Declaring Intention to appropriate—Referendum on Street Extension—Referendum Act Constitutional—Referendum on the Appropriation Ordinance Void, When.

1. When council seeks to appropriate property for the purpose of extending a street, it is necessary under Section 3679, G. C., to pass a resolution declaring its intent to appropriate property for the extension of such street; and the appropriation of property for the extension of a street is a public improvement within the meaning of the term as used in Section 4227-3, G. C. (103 O. L. 212).
2. Under the provisions of Section 4227-3, G. C., such a resolution is a measure required to be passed to complete the legislation necessary, and under the provisions of Sections 4227-1 and 4227-2 a referendum can be held, and under Section 4227-3 must be held, and if such a referendum is not held upon such a resolution no referendum can be held upon any subsequent ordinance or any other measure relating thereto.
3. Where a referendum was held on the resolution to appropriate property for the extension of Crown avenue and the electors of the city of Norwood voted in favor of such resolution, a referendum upon the appropriation ordinance adopted after the result of the election was properly certified is null and void, and a suit by the city under the appropriation ordinance will not be enjoined until the determination of such second referendum election.

Hunt, Bennett & Utter, for plaintiff.

O. F. Dwyer, contra.

MAY, J.

This is an action to enjoin the defendant corporation and its solicitor from prosecuting case No. 160711, which the city

*Affirmed, *McFarlan v. Norwood*, 25 C.C.(N.S.),

of Norwood, through its solicitor, filed in the court of common pleas, in accordance with an ordinance passed on November 10, 1915, directing the solicitor to take the necessary steps for the purpose of having a jury impaneled and assessing damages for the extension of Crown avenue, in said city.

The plaintiff in her petition alleges that she is the owner of a leasehold on the property sought to be appropriated; that prior to the beginning of the suit to appropriate this property, at various times between 1892 and June 21, 1915, the village of Norwood, and later the city of Norwood, passed resolutions and ordinances to appropriate the property in question, and that the proceedings of the council under which the present appropriation is being prosecuted are not valid for the reason that there has been no repeal of the former resolutions and ordinances, and for the further reason that under Section 4227-3, G. C., a referendum petition has been filed with the proper authorities and that by virtue of said referendum petition being filed said ordinance is suspended and no proceedings can be had under it until the matter has been passed on at a general election, which will not take place until April of this year.

The defendant, in its answer, says that all the resolutions and ordinances prior to that of June 21, 1915, were repealed either expressly or by implication, and as a further defense it says that on November 2, 1915, in pursuance of a referendum petition, properly filed, the question was submitted to the voters of Norwood and that on that day an election was had and that the board of elections certified that the resolution adopted on June 21, 1915, to appropriate said property for the extension of Crown avenue, was carried, and that the said referendum petition was filed after the resolution of the council was passed declaring its intention to appropriate property for said extension, and that was the first necessary step in the proceedings, and that therefore the present referendum petition is null and void.

Plaintiff filed a reply denying the allegations in the answer.

At the hearing the following facts were proved:

That all resolutions and ordinances of the village of Norwood, and city of Norwood, for the extension of Crown avenue,

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were expressly repealed, or have been expressly repealed, since the passage of the resolution of June 21, 1915, and the ordinance of November 10, 1915; that at the November election, 1915, a special ballot, reading as follows, was given to each elector of the city of Norwood:

“Special Election
On the Question of
Appropriating Property for
Street Purposes
City of Norwood
Hamilton County, Ohio,
Tuesday, November 2, 1915.

.....
“Shall the Resolution of the City of
Norwood, entitled: ‘A resolution declaring
its intention to appropriate for street pur-
poses certain real estate for the extension of
Crown Avenue,’ passed June 21, 1915, be ap-
proved?”

.....
)“For
The
Resolution.”

.....
)“Against
The
Resolution.”
.....

That among the signers of the referendum petition, in pursu-
ance of which the question was presented to the electors of the
city of Norwood, was T. J. McFarlan, the husband of the plaint-
iff in the present action, and that he is also among the signers
of the present referendum petition asking for a vote upon the
ordinance passed November 10, 1915. A plat of the proposed
extension of Crown avenue was offered in evidence, from which
it appears that the property sought to be appropriated is almost
identical to the proposed appropriation as provided in former
ordinances.

I am of the opinion from the evidence that all prior resolutions and ordinances enacted for the proposed extension of Crown avenue were repealed expressly by other ordinances introduced for that purpose as well as being repealed by implication by the present ordinance.

In my opinion, the important question in this case is, whether the referendum which was voted upon on November 2, 1915, in accordance with the petition presented after the passage of the resolution of June 21, 1915, prevents a further referendum on the subject.

The plaintiff contends that it does not, that under the Constitution and Section 4227-3, G. C., a vote can only be had upon the appropriating ordinance; while the defendant contends that a vote must be had upon the resolution declaring the intention to appropriate.

The correct decision of this question requires an examination of the Constitution of the state, the laws passed in accordance therewith, as well as of the statutes regarding the necessary steps to be taken for the appropriation of property for the extension of streets.

Prior to the adoption of Section 3679, G. C., which now reads:

“When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary,”

it was not deemed necessary to pass a preliminary resolution declaring the intention of council to appropriate property. All that was necessary to be done was the passage of appropriating ordinance. See *Erie Ry. v. Youngstown*, 5 C.C.(N.S.), 332; *Krumberg v. Cincinnati*, 29 Ohio St., 69.

The case of *Cleveland, S. & C. Ry. v. Norwalk*, 17 N.P.(N.S.), 580, is not to the contrary. An examination of that case shows that the bonds to be issued were for the erection of a lighting plant, which are not within the terms of Section 3679.

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Therefore, no ordinance to appropriate property can be valid unless there has been previously passed by council a resolution declaring the intent of council to appropriate property for the purpose mentioned in the ordinance.

Following the passage of this resolution, adopted June 21, 1915, whereby the council of the city of Norwood declared its intention to appropriate for street purposes, for the extension of Crown avenue, certain property, giving its description by metes and bounds, a referendum petition was filed and an election duly held thereon, which resulted in the approval of the resolution by the voters of the city of Norwood.

Prior to the adoption of the Constitution of 1912, the Legislature had provided for a referendum, and under Section 4227-2, G. C., any ordinance, resolution or other measure of a municipal corporation, granting a franchise creating a right, involving the expenditure of money, or exercising any other power delegated to such municipal corporation by the General Assembly, was subject to a referendum petition.

The Constitution of 1912, by the amendment as adopted, now Article II, Section 1f of the Constitution, reads:

“The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipality may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.”

In accordance with this constitutional provision, the Legislature repealed Section 4227-2 and adopted Section 4227-3 (103 O. L., 211, 212), providing:

“Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto.”

Counsel for plaintiff contend that under this provision, the omission of the word “resolution,” upon which a referendum was granted under the previous law, shows the intention of the

Legislature that there should be no referendum on any resolution, and further that the statute, if it should apply to a resolution, is unconstitutional because voting upon a resolution is not voting upon a "question" as provided under the constitutional amendment. Counsel for plaintiff further contend that the appropriation of property for street extension is not an improvement, as the word is used in Section 4227-3.

I am of the opinion that all these objections are not well taken.

As to the constitutionality of the act—all laws of the Legislature and ordinances of council are presumed to be valid unless it appears beyond a reasonable doubt that their constitutionality can not be upheld. A careful reading of Section 4227-3 convinces me that the statute is not unconstitutional and that the power reserved to the people under Article II, Section 1f, of the Constitution, to have a referendum on all questions which the municipality may now or hereafter be authorized to control by legislative action, is safeguarded.*

The question, therefore, is, whether the resolution declaring the intention to appropriate, adopted June 21, 1915, was subject to a referendum under the terms of Section 4227-3.

That section provides that—

"Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto."

A resolution is not an ordinance. Is it a measure as the term is used in the statute?

All the dictionaries, Webster, Century, and Oxford, define "measure" as follows:

*Since this opinion was written, the Supreme Court has handed down an opinion, in the case of *Shyrock v. Zanesville*, 93 Ohio St., —, in which the Supreme Court, in an opinion concurred in by all but one judge, expressly holds that Section 4227-3, G. C., as amended in 103 O. L., 212, is constitutional.

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“Anything devised or done with a view to the accomplishment of a purpose; a plan or course of action intended to obtain some object; a legislative enactment proposed or adopted; any course of action proposed or adopted by a government.”

Now, inasmuch as under Section 3679, the passage of a resolution declaring the intent to appropriate property is a condition precedent to the appropriation ordinance, it necessarily follows that a resolution is a measure required by law to complete the legislation necessary to make and pay for any public improvement, and the extension of a street is a public improvement.

A referendum having been had upon this measure, that is, upon the resolution declaring the intent to appropriate, it necessarily follows that by the very terms of Section 4227-3, it is not necessary to have an additional referendum. That this must be so necessarily follows from the very nature of a referendum. What is the object of a referendum? It is to permit the electors of the district within which the referendum may be had to express their approval or disapproval of the measure adopted by council or by that body whose acts can be reviewed by means of a referendum. In other words, it is an opportunity given by the Constitution and the laws to the electors to express their opinion upon the policy about to be pursued by the legislative body, be it a General Assembly or a council. It can not be urged that the electors of the city of Norwood were not fully advised of what they were voting upon, for the ballot itself, as quoted above, clearly shows what the purpose was. In bold type appears the question:

“Special Election on the Question of Appropriating Property for Street Purposes,” and then appears the text: “Shall the resolution of the city of Norwood, entitled: ‘A resolution declaring its intention to appropriate for street purposes certain real estate for the extension of Crown avenue,’ passed June 21, 1915, be approved?”

Being, therefore, of the opinion that the resolution declaring the intention of council to appropriate is a measure within the meaning of the words used in Section 4227-3 (103 O. L., 212), and such a resolution being the first step necessary to be taken

by council in completing legislation for the purpose of making and paying for a public improvement, and the appropriation of property for the extension of a street being a public improvement, I am of the opinion that it is not necessary to hold another election upon the appropriating ordinance. To come to any other conclusion would be against public policy. It is for the voters to declare at the outset whether a proposed improvement is to be made or not. It saves unnecessary expense in the future if the resolution, which is the first necessary step, is defeated. The mere fact that council may decide not to proceed with the improvement, although authorized by the electors to do so, is no answer to the proposition that it is the first necessary step, because council has the right at any time, even after the passage of the appropriation ordinance, to discontinue all proceedings under it, and even after the condemnation suit has been brought and the jury returned its verdict, council may, within six months, decline to accept the verdict as being excessive or for any other reason that it sees fit and proper. In this particular case there is an additional reason why the plaintiff is not entitled to the relief prayed for. One of the signers of the referendum petition, voted upon at the November 2, 1915, election, was the husband of the plaintiff, and he was also one of the signers of the petition asking for an election upon the passage of the appropriation ordinance. Under these circumstances, it seems to me that the plaintiff is estopped from asking for a second election when her husband was instrumental in getting up the first petition upon which an election was held. It may be presumed that her husband was acting by and with her consent and knowledge and was her agent for the purpose mentioned.

Upon the whole case I am of the opinion that the plaintiff is not entitled to the relief prayed for; that the proceedings are regular and in accordance with all statutory requirements; and that a resolution of council declaring its intention to appropriate property for the extension of the street is the first necessary step in such legislation and is a measure upon which a referendum must be held.

A decree dismissing the petition may be drawn.

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Deppen v. Conkling Co.

**LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT
WHILE LOANED TO ANOTHER.**

Superior Court of Cincinnati.

IRENE DEPPEN v. THE E. A. CONKLING BOX COMPANY.

Decided, January 3, 1916.

*Negligence—Driver and Team Sent to Deliver Christmas Packages—
Under Direction of a Santa Claus Committee—Tail-Gate of Wagon
Falls and Injures a Passer-by.*

The general servant of one master becomes the special servant of another to such extent as to relieve the former from liability for the servant's negligence when the servant is placed under control of the special master and is engaged in carrying out the latter's orders when the negligence occurs, and, in such case, the fact that the wages of the negligent servant were being paid by the general employer is immaterial.

O'Connell & O'Connell, for plaintiff.

Littleford, James, Ballard & Frost, contra.

PUGH, J.

On December 22d, 1913, the plaintiff, Irene Deppen, while passing from the sidewalk, at the southwest corner of Fourth and Vine streets in this city, in an attempt to board a street car which stopped at that place, was injured by the fall of the tail-gate of a wagon which was standing in the street alongside the curb and behind which she was compelled to go in order to reach the car.

The wagon belonged to the defendant, the E. A. Conkling Box Company, and was in charge of one of its drivers, one William Lucas.

This is an action by the plaintiff against the box company to recover damages for the alleged negligence of its driver, Lucas, in permitting the fall of the said tail-gate.

At the close of the plaintiff's case at trial the following state of affairs appeared:

The Chamber of Commerce had appointed a committee to collect and distribute Christmas baskets among the poor of this city, and various business concerns, among them the defendant in this case, had agreed to lend the committee their wagons and drivers for the purpose of delivering their baskets. The committee was popularly called the "Santa Claus Committee."

On the morning of the day of the accident, the driver, Lucas, with his wagon had been sent by his employer to the headquarters of the Santa Claus Committee with instructions to report to such committee and do whatever it ordered him. Lucas drove to the Union Central Building, where the headquarters was located, drew his wagon up alongside the curb, and reported to some unidentified member of the committee, under whose directions the wagon was loaded with Christmas baskets. When the load was complete, Lucas pulled up the tail-gate of the wagon with the intention of fastening it in the usual way, when he was ordered by the committeeman in question to let it down to facilitate quick delivery by the volunteer workers who had loaded the wagon and were to accompany Lucas and make the house-to-house deliveries. The volunteer workers in this case were two boys from the House of Refuge.

Lucas' account of the accident is the only one we have. None of the other witnesses was able to explain why the tail-gate fell, and no member of the Santa Claus Committee was called as a witness, nor did either of the House of Refuge boys appear at trial. The driver's story is that, while lowering the tail-gate, under directions of the Santa Claus Committeeman, the two boys voluntarily lent a hand with such unexpected vigor as to push the gate out of the driver's hands and cause it to fall on the head of the plaintiff who, as stated, was passing behind the wagon at the time.

Whether or not there was any negligence on the part of the driver was never determined, as the court directed a verdict for the defendant on the ground that, when the accident happened, Lucas was acting as the servant of the Santa Claus Committee, as his special master, and not as the servant of his general employer, the E. A. Conkling Box Company.

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The case now comes up on motion for a new trial and the only question presented is whether the court erred in its peremptory instruction to the jury.

There was no dispute of fact involved so far as this question was concerned. Indeed, in their opening statements to the jury and all through the trial and the argument for a new trial, counsel agreed that there was nothing before the court except the question of law, viz., whose servant was Lucas at the time of the accident, in view of the testimony given by him at trial?

It is well established law that the general servant of one master may become the servant of another to such an extent as to relieve the former from liability to third persons for the negligence of such servant. But before this can occur, it must appear that, at the time of the alleged negligence, the servant had been placed by his general employer under the control of the special master, and that he was engaged in carrying out the orders of the special master when he was guilty of the negligence which caused the injury.

8 Thompson on Negligence, Section 3725:

“A servant loaned to another with the consent of the servant is the servant of the person for whom the service is performed where he is under the control of such person in performing the service.”

Rourke v. White Moss Colliery Co., L. R. 2 C. P. (C. A.), 205, 209:

“But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.”

Wolfe v. Mosler Safe Co., 124 N. Y. S., 541 (syl.):

“Where a master loans his servants with their consent to a third person to perform certain work, the third person for the time being is the master, he having for the time being the control of the servants.”

And see, *Wust v. C. C. R. Co.*, 142 Wash., 176, 181, 182; *G. & H. Co. v. Probst*, 208 Ill., 147; 1 *LaBatt's Master and Servant*, Section 57 (2d Ed.); *Mfg. Co. v. Towns*, 148 Ala., 146, 152; *Wyman v. Berry*, 106 Me., 42, 47; *Salvo v. V. M. Larkin & Son*, 144 N. Y. S., 776.

The fact, if such it be, that the wages of the negligent servant were paid by the general employer and not by the special master is immaterial.

The court was and still is of opinion that this case comes within the rule thus stated, and the motion for a new trial will, therefore, be overruled.

**BURDEN OF PROOF WHERE CARRIER CLAIMS
IMMUNITY FOR LOSS.**

Court of Common Pleas of Hamilton County.

HELEN S. WALLS V. THE ADAMS EXPRESS COMPANY.

Decided, July 25, 1916.

Animals Injured in Transit—Burden of Proof Where the Carrier is Charged With Negligence—But Claims Immunity Through a Release Incorporated in the Bill of Lading

1. Under a stipulation in a bill of lading of an interstate shipment whereby the shipper releases and discharges the carrier from all liability for delay, injuries to or loss of animals shipped, from any cause whatever, unless such delay, injury or loss shall be caused by the negligence of the agents or employees of the carrier, the burden of proving that a loss or damage to the animals carried was caused by the negligence of the agents or employees of the carrier is upon the plaintiff under the provisions of the Interstate Commerce Act.
2. All questions concerning liability on interstate shipments must be determined by a uniform rule of the federal law and not by the varying rules of the several states.

Charles W. Baker, Jr., for plaintiff in error.

Maxwell & Ramsey and Robert A. Taft, contra.

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Walls v. Adams Express Co.

GEOGHEGAN, J.

Error to the municipal court of Cincinnati.

The plaintiff in error brought her suit in the municipal court of Cincinnati against the defendant in error for \$150 in damages for negligence in the carriage of three dogs from Camp Dennison, in the state of Ohio, to Pine Point, in the state of Maine. Plaintiff proved that the dogs were delivered to the Adams Express Company in good condition; that they were carried to Pine Point, Maine, and thereupon were returned to Camp Dennison, Ohio; that upon being offered to plaintiff in error they were found to be afflicted with mange and appeared to be in an emaciated or starving condition; that the value of the dogs was \$25 each. She thereupon rested her case.

The defendant offered no testimony, and the case being submitted without the intervention of a jury, the court below entered up a verdict for the defendant.

Error is prosecuted to this court, and the only question presented is whether or not the plaintiff, under such proof, made out a *prima facie* case, which, in the absence of proof to the contrary, would entitle her to a judgment. If the rule in Ohio were to be applied there is little doubt but that under the proof a judgment should have been rendered in her favor. The rule in Ohio undoubtedly is that where a common carrier claims immunity for the loss of goods with which he has been entrusted, on the ground that such immunity is secured by a special agreement, the burden is on him to prove that the loss was occasioned without his fault. *Express Co. v. Graham*, 26 Ohio St., 595; *Gaines v. Transportation Co.*, 28 Ohio St., 418; *Express Co. v. Backman*, 28 Ohio St., 144; *Graham v. Davis*, 4 Ohio St., 362; *Davis v. Graham*, 2 Ohio St., 131. But as this shipment was concededly an interstate shipment, the question arises as to whether or not the Carmack amendment to the Hepburn act, generally referred to as the Interstate Commerce act, makes a change in this rule, in so far as a shipment of this character is concerned.

The bill of lading under which the property herein was shipped contains the following stipulation:

“Shipper hereby releases and discharges the express company from all liability for delay, injuries to, or loss of said animals from any cause whatever, unless such delay, injury or loss shall be caused by the negligence of the agents or employes of the express company, and in such event the express company shall be liable only to the extent of the actual damages, which shall in no event exceed the valuation herein declared by the shipper.”

The United States Supreme Court has declared that under the Interstate Commerce act, all questions concerning liability on interstate shipments must be determined by a uniform rule of the federal law and not by the varying rules of the several states. *Adams Express Co. v. Croninger*, 226 U. S., 491; *Railroad Co. v. Miller*, 226 U. S., 513.

In *Adams Express Company v. Croninger*, *supra*, it is said in the syllabus:

“In enacting the Carmack amendment, it is evident that Congress intended to adopt a uniform rule as to the liability imposed upon interstate carriers by state regulations and bills of lading, and to relieve such contracts from the diverse regulation to which they had theretofore been subject.”

And at page 505, Mr. Justice Lurton, speaking for the court, says:

“That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist.” *Northern Pacific Ry. v. State of Washington*, 222 U. S., 370; *Southern Ry. v. Reid*, 222 U. S., 424; *Mondou v. R. R.*, 223 U. S., 1.

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Therefore, the question as to whether, under the state of the evidence in this record, taking into consideration the stipulation in the bill of lading above referred to, the burden of going forward with the proof in order to rebut or countervail the *prima facie* case made out under the law of the state of Ohio, rested upon the express company, is to be determined by the rule of the federal courts, and that rule, I take it, has been handed down in the case of *Cau v. Texas & Pacific Ry.*, 194 U. S., 427, where it is held that, while the burden may be upon the carrier to show that the damage complained of resulted from the excepted cause contained in the bill of lading, after that has been shown, the burden is upon the plaintiff to show that it occurred by the carrier's own negligence, from which it could not be exempted, and in support of this rule the Supreme Court cited *Clarke v. Barnwell*, 12 Howard, 272, and *Transportation Co. v. Downer*, 11 Wallace, 129. And in a recent case decided by the Supreme Court of the United States, on April 10, 1916, the court took occasion in an action involving an interstate shipment, to express substantially the same rule, having before it for consideration the Interstate Commerce act. The case is styled *Southern Ry. Co. v. Prescott*, 240 U. S., 632, in which case the Supreme Court of the United States reversed the Supreme Court of South Carolina for holding that where a loss occurs by fire the burden is upon the carrier, acting as warehouseman, to show that it was without negligence, the Supreme Court of the United States holding that:

“Under a stipulation in a bill of lading of an interstate shipment that the carrier shall be liable as warehouseman only, for goods after arrival at destination and not removed within a specified time the carrier is liable for negligence, and if the loss admittedly occurs by fire the burden is on the plaintiff to prove negligence, notwithstanding the rule may be different under the state law.”

In that case it was shown that under the terms of the bill of lading the carrier was not to be liable for property not removed by the party entitled to receive it within forty-eight hours after

notice of its arrival, but that after said time it might be kept subject to reasonable charge for storage and to carrier's responsibility as warehouseman only.

The state courts decided that inasmuch as the property had not been removed within forty-eight hours, the carrier was merely a warehouseman, and that under the South Carolina rule, the property being destroyed by fire, the burden of showing that there was no negligence causing the fire was on the railroad company. But the Supreme Court of the United States decided that the Interstate Commerce act covered not only the mere transportation, but the services in connection with the receipt, delivery, etc., and that the service as a warehouseman was covered by the act, and that, therefore, the rule of the federal courts as to the liability of the warehouseman should have been applied, which rule is that a warehouseman is not liable for fire unless it is shown that it was caused by some negligence on the part of himself or his servants, and the court cites numerous authorities in support of the latter proposition.

In view of these rulings of the Supreme Court, it would seem that the question involved herein should be decided in accordance with the rule of the federal courts, and that the doctrine laid down in *Cau v. Railway Co.*, *supra*, and the cases therein cited, are determinative of this case. Therefore, the court is of the opinion that the municipal court did not err in giving judgment for the defendant, and the judgment will be affirmed.

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Rabe et al v. Perry et al.

PROPERTY HELD IN TRUST FOR CHILDREN BY FIRST MARRIAGE.

Common Pleas Court of Hamilton County.

CLARA RABE ET AL V. AMELIA PERRY ET AL.

Decided, 1916.

Wills—Property Devised to Children—With Life Interest in Widow to be Reduced to Dower in Event of Remarriage—Purchase of Title by Mother Without Consideration Does Not Defeat Rights of Children.

Where a testator devises his real estate to his children, subject to a life estate in his widow, to be reduced to dower interest in case of her remarriage, the course of title is not changed by a sale of the property to her without consideration upon her remarriage, but the property will be treated as held in trust for the children of the first marriage, against whom the statute of limitations does not run.

Franks & Franks and Joseph W. O'Hara, for plaintiffs.
Dudley C. Outcalt, contra.

NIPPERT, J.

The plaintiffs, Clara Rabe and Katherine Ginn, and the defendant, Bess Ragland, brought this action in partition to settle the estate of their mother, Louisa Engel Wager, who died intestate December 3, 1914.

The defendants, Amelia Perry et al, deny the plaintiffs' right to partition on the ground that the children of Henry Wager have no legal title or interest in the real estate under consideration, but that the real estate in question was held by Mrs. Louisa Engel Wager in trust for her children by her first husband, Herman Engel, who died October 1, 1873.

Engel left a last will and testament, in which he devised his real estate to his four children, subject to the life estate of his wife, Louisa Engel. In case of her remarriage she was only to have a dower interest in said real estate from the time of such

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remarriage. The testator, Engel, charged his wife with the duty to educate and maintain the minor children out of the rents and issues of his real estate. At their father's death, in 1873, the children were aged two, four, six and seven years respectively, and Louisa Engel, their mother, was appointed their guardian.

On March 11, 1875, Louisa Engel married one Henry Wager, and Wager had himself appointed guardian of the four minor Engel children, one John Gradel going on his bond. On February 9, 1875, Gradel was appointed administrator with the will annexed of the estate of Herman Engel deceased. Soon thereafter the Engel property was sold under proceedings, the record of which was destroyed during the court house fire. The purchaser was one Joseph A. Ankenbauer, whose wife was a cousin of Henry Wager, and who testified, during the trial of this case, that neither she nor her husband paid any consideration for this property, and that immediately upon the conveyance to them of the Engel property she and her husband executed a deed back to Engel's widow, that is, Louisa Engel Wager, the mother of the defendants in this action. The deed bears the date of August 5, 1876, and was recorded July 5, 1882, six years after its execution. Mrs. Ankenbauer testified that she and her husband came to town to sign this deed as a favor to their cousin, Mr. Wager, and never paid or received a cent in either of the transactions, though the deed recites a consideration of \$10,000. No settlement was ever made by Henry Wager, but the guardian docket, mutilated though it is, shows that on the day following Henry Wager's appointment as guardian, Mrs. Louisa Engel Wager filed her account. Henry Wager, as far as the record shows, never filed an account as guardian.

The children of Henry and Louisa Wager claim that they have an undivided interest in the property in common with the children of Mrs. Wager by her first husband, Herman Engel. They base their claim upon the Ankenbauer deed.

But it appears that the Ankenbauer deeds were executed merely as an accommodation for the benefit of Wager and his wife, and while the Engel children were still minors, and no account appears of record showing how the \$10,000 consideration

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money mentioned in the Ankenbauer deed was used. Of course, this \$10,000 consideration money is fully explained by the testimony of Mrs. Ankenbauer, who said that no such money ever passed; that Ankenbauer never had \$10,000 to his name, and therefore could not have paid it.

It appears that this deed was merely a means of changing the title from the Engel minors, who held the fee immediately upon the remarriage of their mother, and by means of the Ankenbauer route the title was intended to be placed in fee simple in the name of Louisa Engel Wager.

Such transactions are closely scrutinized by our courts, and have always suffered the court's disapproval. They are considered a fraud upon the minors, and for that reason null and void.

Mrs. Wager, therefore, held this property in trust, from the day of her second marriage, for the benefit of her children by her first husband.

Now it appears from the testimony that Mrs. Louisa Engel Wager said in the presence of all of the children, that is to say, of the Wager children, as well as the Engel children, all of whom are parties to this action, that the real estate which she owned came to her from her first husband, Engel, and belonged to the Engel children, and that if the property was ever sold, the proceeds of the said sale would be divided among the Engel children. The testimony shows that during these years Mrs. Engel collected the rents and after deducting her own living expenses she divided the rent money among the Engel children from time to time.

The court therefore finds that Mrs. Louisa Engel Wager held this property in trust for the children of her first husband, Herman Engel, from the day of her remarriage to Henry Wager, to-wit, March 11, 1875; that she has never disclaimed the trust either expressly or impliedly; that therefore the statute of limitations does not run against the *cestui que trust*, to-wit, the four children of Herman Engel; that said children or their heirs take the real estate described in the petition under the terms of the last will and testament of Herman Engel, deceased;

that the plaintiffs, Clara Rabe, Katherine Ginn, and the defendant, E. Bess Ragland, are not entitled to have partition of the estate of Louisa Engel Wager, as prayed for, but that Amelia Perry, Louisa Woerth, Matilda Frahm and Frederick Engel are each seized of an undivided one-fourth part of the premises described in the petition.

**RIGHTS IN THE STREETS OF AN UNREGISTERED
AUTOMOBILE.**

Common Pleas Court of Darke County.

J. W. JACKSON V. THE OHIO ELECTRIC RAILWAY COMPANY.

Decided, February 23, 1916.

Motor Vehicles—Failure to Register Machine—Does Not Make it a Trespasser in the Streets—Injury Through Negligence to Such a Machine or its Driver Actionable—Effect of a Declaration of Emergency in the Enactment of a Statute.

In an action by the operator of an automobile to recover damages for personal injuries caused by the automobile colliding at a grade crossing with an interurban passenger car of an electric railway company negligently operated by the motorman in charge thereof, it is no defense that such automobile is not registered as required by law.

Martin B. Trainor, for plaintiff.

John F. Maher, contra.

BOWMAN, J.

The plaintiff sues to recover damages for personal injuries sustained in the collision of an automobile, belonging to his employer, which he was driving, with one of the interurban passenger cars of the defendant at a grade crossing in the city of Greenville, Ohio, caused, as he alleges, by the carelessness and negligence of the motorman in charge of said car.

The fourth defense of the answer is, that said automobile was not registered as required by law.

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Plaintiff demurs on the ground that said defense is insufficient in law.

Section 6294, General Code, as amended February 16th, 1914 (104 O. L., 248), provides for registration of automobiles by the owner; and Sections 12613 and 12620 make it a misdemeanor if he fails to file, or cause to be filed, annually, the application for registration, or to pay the legal fee therefor, or fails to have the distinctive number and registration mark furnished by the secretary of state for such motor vehicle displayed on the front and rear thereof.

The owner had not complied with this law, and it is claimed that plaintiff, driving said unregistered motor vehicle, was a trespasser and an outlaw upon the public streets and highways, for the reason that the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect, and that the defendant owed him no duty save only not to wilfully and wantonly injure him after discovering him in a place of danger, and in support of this claim, counsel for the defendant cite *Chase v. Railroad Co.*, 208 Mass., 138; *Bourne v. Whitman*, 209 Mass., 155; *Dean v. Boston Elevated Railway*, 217 Mass., 495; *Gould v. Elder*, 209 Mass., 396; *Dudley v. Northampton Street Railway Co.*, 202 Mass., 443.

In those cases the court had under consideration a statute similar to Section 6294 of the General Code of this state, and in holding that a person driving or being transported in an unregistered automobile has not the rights of a traveler lawfully upon the public highway, Knowlton, C. J., speaking for the court in *Chase v. Railroad Co.*, *supra*, at page 158, says:

“Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering upon the crossing the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is within the words of the statute. He is in no better condition to recover than a person would be who was violating the law by walking on the track of a railroad, and was struck by an engine when he had

reached the crossing of a highway. Every minute of the time, and in every part of his movement, while walking upon the track in his approach to the crossing, he would be a violator of the law and a trespasser."

The Massachusetts cases, however, seem to stand alone, and the weight of authority and the better reason are opposed to this claim. While Section 6294, General Code, makes it the duty of the owner to register his motor vehicle and for its violation penalties are prescribed, there is nothing therein or other statutory provision, which makes a traveler with an unregistered automobile a trespasser upon the public streets and highways, or which in any way affects the general duty which the defendant owes to the law, to so operate its cars as not to negligently injure the person or property of another.

In the absence, therefore, of any statutory provision to that effect, the mere fact that plaintiff's automobile was unregistered, does not place him beyond the pale of the law nor preclude a recovery for an injury sustained by him unless his failure to register the automobile in some way contributed to the cause of the injury.

In *Armstead v. Lounsberry*, 129 Minn., 34, the defense was that plaintiff's automobile was not registered as required by law, and it was held that that fact would not relieve the defendant, unless it had some casual connection with the injury of which he complained and contributed thereto; for, as said by Hallam, J., in that case:

"The right of a person to maintain an action for a wrong committed upon him is not taken away because he was at the time of the injury disobeying a statute law which in no way contributed to his injury. He is not placed outside all protection of the law, nor does he forfeit all his civil rights merely because he is committing a statutory misdemeanor. The wrong on the part of plaintiff, which will preclude a recovery for an injury sustained by him, must be some act or conduct having the relation to that injury of a cause to the effect produced by it."

The case of *Hemming v. New Haven*, 82 Conn., 661, was an action to recover damages for injuries to the person and automo-

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bile of the plaintiff, which were alleged to have been caused by a defective highway. The plaintiff had failed to register his automobile as required by law, and in holding that the use of an unregistered automobile upon the public highway would not preclude the owner from recovering damages from a city for injuries to himself and to the car which were caused by a defect in the highway due to the city's negligence, Roraback, J., at page 663 says:

“The plaintiff was violating the statute relating to the registration of automobiles, but that fact does not relieve the defendant. This statute imposed an obligation upon the plaintiff to register his automobile, and for its violation prescribed a penalty. The statute goes no further, and it can not be held that the right to maintain an action for damages resulting from the omission of the defendant to perform a public duty is taken away because the person injured was at the time his injuries were sustained disobeying a statute law which in no way contributed to the accident. A traveler with an unregistered and unnumbered automobile is not made a trespasser upon the street, neither does it necessarily follow that the property which he owns is outside of legal protection when injured by the unlawful act of another.”

To same effect are *Birmingham R., Light & P. Co. v. Aetna Accident & Liability Co.*, 183 Ala., 601; *Atlantic Coast Line Railroad Co. v. Weir*, 63 Fla., 74; *Shaw v. Thielbahr*, 82 N. J. Law, 23; *Hughes v. Atlanta Steel Co.*, 136 Ga., 511; *Crossen v. Chicago & Joliet Elec. Ry. Co.*, 158 Ill. App., 42; *Luckey v. Kansas City*, 169 Mo. App., 666; *Yeager v. Winton Motor Carriage Co.*, 53 Pa. Supreme Ct., 202; *Hyde v. McCreery*, 130 N. Y. Supp., 269; *Elliott on Roads & Streets*, Section 1115.

There is no averment or claim here that the registration of said automobile would have prevented said collision, nor the fact that it was unregistered contributed in the least degree thereto. In other words, there was no relation of cause and effect between the failure to register said automobile and the injury to plaintiff.

Further claim is made that in declaring said act of February 16th, 1914, an emergency act, the Legislature having in effect declared that unless so registered, owners, operators and chauff-

fers of motor vehicles "have no legal right to operate their vehicles upon the public streets and highways," the operation of unregistered motor vehicles is thereby prohibited, and the omission, therefore, to do what the law requires is negligence *per se*, and takes away the right to maintain an action for damages for injuries received by reason of the operation thereof.

This declaration of emergency, however, is no part of the act, but operates simply to put the same into immediate effect, and therefore not subject to referendum. But if it were otherwise, it is sufficient to say that it was not the purpose of Section 6294, General Code, to prevent collisions, and neither it, nor said emergency declaration take away the right of an owner or operator of an unregistered motor vehicle to prosecute an action for any injury to person or property received by reason of the operation of such motor vehicle in or upon the public streets and highways of this state, and nothing short of an express statute to that effect would preclude a right of action and recovery unless the failure to register in some way contributed to cause the injury.

In such case, doing the forbidden act is a breach of duty in respect to those who may be injured thereby. *Monroe v. Hartford Street Railway Co.*, 76 Conn., 206. But there is no such statute, and Section 6294, General Code, does not have such effect.

.It follows that the third defense is insufficient in law.

Demurrer sustained.

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Cavanaugh v. Railway.

EXEMPTION OF RAILWAY COMPANIES FROM NEGLIGENCE.

Court of Common Pleas of Clark County.

MARGARET CAVANAUGH, ADMINISTRATRIX, v. THE C., C., C. &
ST. L. RAILWAY COMPANY.

Decided, November 13, 1916.

*Contracts of Exemption from Liability for Negligence—Application of
Section 5 of the Federal Employers' Liability Act—Assumption of
Risk as a Subject of Contract—Telegrapher Killed While Using the
Track of His Employing Company on His Way to Work.*

A telegraph operator in the employ of a railway company, engaged in interstate commerce, contracts expressly with said railway company that, if said railway company will let him use his speeder or velocipede on the tracks of said railway company in going to and from his work, he will assume all risk of personal injury to himself or to his property while he is so using such speeder or velocipede. He further agreed to keep himself informed of the movements of trains upon the tracks of said railway company and to remove his speeder from the tracks in time to avoid collision, notwithstanding such trains, engines and cars might be run at high speed and without warning to him and he assumed all the risk of injury that he might receive through any cause while operating his said speeder upon the tracks of said railway company.

Held: That such contract violates Section 5 of the federal employers' act, and is against public policy and void.

John M. Cole, for the motion.

Bowman & Bowman, contra.

STEPHENSON, J.

This is an action by the administratrix of Walter D. Cavanaugh, deceased, against the defendant railway company for alleged wrongful death. The petition states generally that the plaintiff is the administratrix of the estate of Walter D. Cavanaugh, deceased; that on the night of August 19th, 1915, her decedent was in the employ of the defendant railway company

in the capacity of telegraph operator; that his office was at Sand Cut station, some miles out of the city of Dayton, Ohio; that he was going to his work on a speeder or railway velocipede and was run down by one of the defendant company's freight trains and killed.

Plaintiff alleges that the defendant company was negligent in that it failed to pay attention to certain signals flashed from stations and did not observe the light on the rear of the speeder operated by plaintiff's decedent; that by reason of such negligence of defendant company plaintiff's decedent was killed, and she asks damages in the sum of \$25,000.

The defendant, answering, admits the employment of the decedent as telegraph operator of the defendant railway company at the Sand Cut office; admits he was killed about 11:30 P. M. on the 19th of August, 1915, while riding a speeder on the main track of the defendant railway company, and denies any negligence on its part, or any of its employees, agents or servants, except that of the decedent Walter D. Cavanaugh, who it is alleged was running without a light of proper brightness on the rear of his speeder and failing to keep a proper lookout for trains. It further denies that any of its employees or any of those in charge of its freight trains had any notice or warning of the presence of the speeder or of other danger on the track in time to enable them to avoid the accident, and denies that the train was operated in a negligent or improper manner or was in any way handled negligently or improperly. It denies that Walter D. Cavanaugh was required to ride the speeder to his working place, and denies every other allegation contained in the petition not specifically admitted to be true.

For so much of the second defense as it is necessary to refer to in order to pass on this motion, the defendant railway company says that the death of Walter D. Cavanaugh was due to his attempting to ride on a certain speeder owned by him over the west bound tracks of the defendant from a point in the city of Dayton and the using of the railway company's tracks for such purpose when said tracks were constantly being used by defendant for the passage of its trains, both freight and

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passenger, regular and extra, and while the east bound track immediately adjoining the west bound track was being used by the defendant in the same manner and to the same extent; that the use of said tracks was made by said Cavanaugh under a permit granted to him at his request and with the express agreement upon his part that he would and did assume all risks of personal injury to himself or to his property while he was so using such speeder, and defendant further says that at the time of the accident resulting in the death of said Cavanaugh defendant's trains were being operated on its said tracks in the usual and ordinary way, with which said Cavanaugh was entirely familiar; and the hazard of attempting to use such tracks with said speeder had been fully explained to him and was fully understood by him, and he agreed to keep himself informed as to the movements of trains on such tracks and to remove his said speeder from the track in time to avoid a collision, notwithstanding such trains, engines or cars might be run at a high rate of speed and without warning to him, and that said Cavanaugh assumed all the risk of injury that he might receive from any cause while operating his said speeder on the tracks of this defendant.

Plaintiff moves the court to require the defendant to strike out of the second defense the following words:

“And said use of said tracks was made by said Cavanaugh under a permit granted to him at his request and with the express agreement on his part that he would and did assume all risk of personal injury to himself or to his property while he was so using such speeder.”

And also the following:

“And he agreed to keep himself informed of the movement of trains on such tracks and to remove his said speeder from the track in time to avoid a collision, notwithstanding such trains, engines and cars might be run at a high rate of speed and without warning to him, and the said Cavanaugh assumed all risk of injury that he might receive through any cause while operating his said speeder upon the tracks of this defendant.”

The reason for asking the court to strike this matter out of the second defense plaintiff avers is because such matter is immaterial and irrelevant.

The first proposition that addresses itself to the mind of the court is whether or not this pleading is violative of Section 5 of the federal employers' liability act. Section 5 of said act is as follows:

"That any contract, rule, regulation or device whatsoever the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void."

If the pleading does not violate Section 5 of said act, then it is insisted that an assumption of risk can not be made a subject of contract, and if it is made a subject of contract, such contract is bad as being against public policy.

It is conceded that the decedent, Walter D. Cavanaugh, was engaged in interstate commerce at the time of his death. This fact is pleaded by the plaintiff in the petition and amplified by the defendant in its answer.

The law might permit a railway company to enter into a contract with an employee, exempting itself from liability from negligence when said employee was acting entirely outside the scope of his employment, but under those circumstances the person with whom such contract was made would not be an employee if the company, but a bare licensee at the best, and a company would owe him no duty other than to refrain from wilfully and wantonly killing or injuring him. If Walter D. Cavanaugh at the time he was killed was an employee of the defendant railway company, then this contract exempting the railway company from liability is void.

It being conceded that the decedent, Walter D. Cavanaugh, was engaged in interstate commerce at the time of his death, then it must be further conceded that the federal law applies. There is no federal statute defining the term employee so as to fit this particular case. Hence we must look to the federal com-

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mon law to determine just when a servant steps into the scope of his employment.

Without citing the authorities, the weight of the federal decisions on this proposition is overwhelmingly to the effect that any employee of a railway company using the tracks of the company as a means of transportation to and from his work becomes an employee when he sets his foot upon the railroad property preparatory to going to his place of employment.

It is conceded that Walter D. Cavanaugh was going from Dayton to Sand Cut station, the place of his employment, on his speeder, using the tracks of said company as a means of transportation to his place of employment.

Consequently he was an employee, under all the federal authorities, of the defendant railway company and was acting within the scope of his employment.

The finding of the court is that said contract violates the provisions of Section 5 of the federal employers' liability act, is likewise against public policy and is absolutely void.

The motion will be sustained as to both assignments.

ATTACHMENT OF DEBTOR'S WAGES.

Common Pleas Court of Hamilton County.

S. J. D. MEADE v. HENRY RICE.

Decided, May 8, 1916.

*Attachment—Defective Affidavit in Suit on Claim for Necessaries—
What the Affidavit Should State—Giving of Ten Per Cent. Notice Does Not Supply Omission as to What it is Sought to Attach.*

An affidavit for attachment on a claim for necessities should plainly state that it is only the ten per cent. of the debtor's wages which it is sought to attach, and where this is not done the statement in the affidavit that the plaintiff gave the ten per cent. notice does not cure the defect.

R. G. Brown, for the motion.

H. E. Stagman, contra.

GEOGHEGAN, J.

This is a proceeding in error to reverse the judgment of the Municipal Court of Cincinnati in overruling a motion made to discharge the attachment herein on the ground of the insufficiency of the affidavit for attachment.

The affidavit for attachment is, in substance, that the claim is for necessities for rent of a flat; that the claim is just; that the plaintiff ought to recover the sum of \$21; and then there appears the following language:

"This affiant further says that this attachment is made under Section 11819 of the General Code of Ohio, and that the plaintiff has given to defendant, Henry Rice, the ten per cent. notice provided by law."

§ 11819. . . .

There are two exceptions taken by the learned counsel for the defendant to the sufficiency of this affidavit.

The first exception is, that Section 11819 of the General Code provides how attachments may be secured in actions in which the common pleas court has jurisdiction, and inasmuch as the amount claimed herein is \$21, it is a matter in which prior to the passage of the municipal court act for the city of Cincinnati a justice of the peace would have exclusive jurisdiction, and therefore it appears on the face of the affidavit that no attachment could be had under the provisions of Section 11819 of the General Code.

The second exception is that even if the mistake in the number of the statute may be disregarded and the attachment may be construed as meaning the attachment provided for in Section 10253, General Code, the affidavit is insufficient because it does not state that the property sought to be attached is not exempt from execution.

It seems to me that this latter exception is well taken.

Section 10253 provides that the affidavit shall show the nature of the claim, that it is just, the amount the affiant believes ought to recover, and that the property sought to be attached is not exempt from execution, and that if the attachment of

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the personal earnings of the defendant be sought on the ground that the claim sued on is for work, labor or necessities, then that fact should be stated in the affidavit.

It is a proposition of law too trite to need the citation of authorities that an attachment before judgment, being an extraordinary remedy, the provisions of the statute allowing it should be strictly construed, and that in order to obtain the attachment the provisions of the statute should be strictly followed.

In the case of *K. B. Company v. James Batie*, 2 C.C.(N.S.), 358, the Circuit Court of Cuyahoga County, in construing the section of the statute admitting attachment where ten per cent. of the debtor's earnings are sought to be obtained upon a claim for necessities, laid down the rule that the affidavit must contain a statement that the property sought to be attached is not exempt from execution.

Now, as this attachment could only be had under the provisions of Section 10253 of the General Code, it follows that the provision of that statute as to what the affidavit should contain should be followed, and that therefore, inasmuch as there is no positive statement that the property herein sought to be attached is exempt from execution, it is evident that the affidavit is insufficient for the purposes of attachment under that section.

When one considers that this affidavit recites that the attachment is sought to be made under the provisions of Section 11819 of the General Code, and when one considers the provisions of Section 11820 of the General Code, which provides how an attachment sought under the provisions of Section 11819 shall be had, it is evident how the failure to include the language that the property is not exempt from execution occurred in this affidavit, for while Section 11819 provides that an attachment may be had when the claim is for work, labor or necessities, Section 11820 does not provide that the affidavit to secure an attachment under the provisions of Section 11819 shall contain a statement that the property sought to be attached is exempt from execution. But inasmuch as there is no authority to maintain

an action in the common pleas court for a sum of money less than one hundred dollars, it follows that this attachment could not be brought under the provisions of Section 11819, and inasmuch as Section 10253 provides plainly that the affidavit shall contain a statement that the property sought to be attached is not exempt from execution, it is evident that even considering this affidavit as having been brought under the later section it does not follow the provisions of said section and is therefore insufficient in law.

Inasmuch as since the passage of the act under which ten per cent. of a debtor's personal earnings may be attached on a claim for necessities, said ten per cent. is no longer exempt from execution and attachment, the affidavit should plainly state that it is only the ten per cent. that is not so exempt that is sought to be attached, and this the affidavit under consideration here does not do, and I do not think that the statement in the affidavit that the plaintiff gave a ten per cent. notice cures the defect because for all that appears on the face on the affidavit an attempt may have been made herein to attach more than the ten per cent. which is not exempt from execution and attachment.

The motion to discharge the attachment should have been granted and an order will be made accordingly.

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Olmsted et al v. Edwards et al.

**INDIVIDUAL BOND DOES NOT COVER FIRM
INDEBTEDNESS.**

Superior Court of Cincinnati.

O. H. OLMSTED ET AL V. W. H. EDWARDS ET AL.*

Decided, December 22, 1913.

Sureties—Equivocal Language in Bond Will be Construed Against the Principal, When—Surety on Bond Covering Individual Indebtedness—Not Bound to Make Good Indebtedness of a Partnership of Which His Co-Obligor is a Member.

1. Where a principal furnishes his agent with a special, printed form of bond for the purpose of having the same executed by such agent and a surety, and said form of bond contains language which, under the circumstances, is uncertain and equivocal as to the nature of the liability assumed by the surety and the latter is misled thereby, the court, in an action against the surety on such bond, will construe the uncertain and equivocal language in the sense most favorable to the surety.
2. A surety who executed a bond by which he became liable for the accounting of his co-obligor as agent of the obligee, and who, when he signed the instrument believed and had been so led to believe by the terms of the bond and the circumstances surrounding the transaction, that such co-obligor was individually the agent of the obligee, is not liable on such bond for the default, as agent of the obligee, of a co-partnership firm of which his co-obligor was a member nor for such share of the firm's indebtedness to the obligee as was incurred by the conduct of his co-obligor while acting as a member of such firm.

A. C. Shattuck, for plaintiff.

John C. Healy and *A. L. Herrlinger*, contra.

PUGH, J.

This case comes before the court on the motion of the plaintiffs for a new trial. At the close of the testimony, the court directed the jury to return a verdict in favor of the defendant,

*Affirmed by the Court of Appeals, *Olmsted v. Albers*, 26 C.C.(N.S.), —.

H. W. Albers, and this action of the court, it is claimed, was contrary to law.

The suit was originally brought against W. H. Edwards and H. W. Albers, but, as Edwards did not answer, a judgment by default was taken against him and the trial, which was thereafter had, involved only such issues as were raised by the pleadings between the plaintiffs and the defendant, Albers.

At trial, the plaintiffs offered in evidence the default judgment, and it is assigned as error in this motion that the court refused to admit it. Inasmuch as the judgment was rendered in this very case and was part of the record, the court took judicial knowledge of it, but in view of the ruling of the court on the main issue involved, it is unnecessary here to consider whether such judgment was of any effect as far as the defendant Albers was concerned.

(1). The partnership firm of Olmsted Bros. of Cleveland, state agent in Ohio of the National Life Insurance Company of Vermont, on December 15, 1893, entered into a written contract with the firm of Van Buren & Edwards of Cincinnati, whereby the latter firm was appointed agent of said insurance company for Hamilton county and other southern counties of Ohio upon certain terms and conditions set out in said agreement.

Van Buren & Edwards in April, 1894, assigned their contract to the firm of Edwards & Evans, and on May 9, 1894, this assignment was approved and accepted by Olmsted Bros. as follows:

“CLEVELAND, OHIO, May 9, 1894.

“The above assignment is hereby approved and the co-partnership of W. H. Edwards and John G. Evans recognized under the within contract.”

“OLMSTED BROS.”

The contract contained, *inter alia*, the following stipulation:

“This contract shall not take effect or be binding until said party of the second part has furnished to said party of the

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first part a satisfactory bond in the sum of five thousand dollars.”

The bond for five thousand dollars thus required was not given, but each member of the firm of Edwards & Evans gave a separate individual bond in the sum of twenty-five hundred dollars.

On March 23, 1895, the surety for W. H. Edwards withdrew and a new bond for twenty-five hundred dollars was furnished with W. H. Edwards as principal and the defendant, H. W. Albers, as surety.

The plaintiff claims that the firm of Edwards & Evans is short in its accounts as agent aforesaid, and that the share of said shortage that W. H. Edwards and his surety H. W. Albers, must bear is \$1,105.60, recovery of which sum, with interest, is sought in this action.

It is clear that the contract of employment was entered into between the firm of Olmsted Bros. styled therein, “party of the first part,” and the firm of Edwards & Evans, styled “party of the second part,” and that the firm of Olmsted Bros., with the exception of the matter of separate bonds, never at any time dealt with or recognized W. H. Edwards or John G. Evans in any other character than as Edwards & Evans, a partnership.

It is undisputed that, when the surety, H. W. Albers, executed the bond he believed—and had no reason to believe otherwise—that W. H. Edwards in his individual capacity was the agent employed by Olmsted Bros., and that he had no knowledge or notice whatever that the firm of Edwards & Evans was the agent. Indeed, he had no knowledge that any such firm existed. The bond is the individual obligation of W. H. Edwards and contains no reference whatever to the firm of Edwards & Evans or any other copartnership. With the possible exception of one clause which refers to “joint solicitors or agents,” and which will presently be considered, there is nothing in the bond to indicate that anyone was associated with W. H. Edwards in the employment. The liability of the ob-

ligors is limited in terms to such business as passed through the agency of W. H. Edwards.

The clause in the bond above referred to as a possible exception is as follows:

“It is understood between said obligor and obligees that this bond shall continue and remain in force one year after date and shall cover all liabilities and delinquencies of said W. H. Edwards to said obligees, whether the same shall arise under his present appointment or under any future appointment or agreement whether as solicitor or agent or as joint solicitor or agent with any other person or persons, or by sub-agents appointed by said W. H. Edwards.”

The above language to say the least, must have been ambiguous to one in the situation of the surety Albers when he signed the bond. The instrument was brought to him by some one acting in the interest of W. H. Edwards and, in the absence of information to the contrary and misled by the explicit language of the instrument limiting the obligation to W. H. Edwards individually and the liability to such business as passed through the agency of W. H. Edwards, he believed that no one other than Edwards was concerned. The clause “whether as solicitor or agent or as joint solicitor or agent with any other person or persons” may easily have been understood by Albers as referring to a possible “future appointment,” which is sharply distinguished in the instrument from “his present appointment.” Reading this language as the surety did with the understanding that the words “his present appointment” was an employment of Edwards as an individual, the words “joint solicitor or agent with any other person or persons,” certainly does not convey the idea that Edwards was then a member of a partnership and that the expression “his present appointment” meant the employment of a firm of which Edwards was only a member. Just above this in this context, the liability had been pointedly limited to business which passed through the agency of W. H. Edwards—not of Edwards & Evans.

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The expression, "joint solicitor or agent with any other persons or persons," is not a description of one who is a member of a partnership firm. Employed in relation to one engaged as Edwards was in soliciting life insurance, where compensation consisted of commissions based upon the amount of business done and premiums collected, it seems rather to have been inserted in the bond to cover instances where more than one person was engaged in effectuating the insurance, and the commission had therefore to be divided. If the principal obligor was a member of a partnership firm and the surety was to be liable for him as such, why was it not so stated in plain and simple language?

Where a written instrument is drawn up by one of the contracting parties and furnished the other party, ready-made as it were, to be signed by the latter, ambiguous or doubtful language should be resolved against the party who thus selected it, and he should not be permitted to take advantage thereby of one misled by it. See 2 *Page on Contracts*, Section 1122.

This rule, it is true, is of limited use and only occasional value in construing contractual stipulations, but the circumstances shown in evidence in this case, in the opinion of the court, call for its application here. The bond here is upon a written form, provided by the obligee and the ambiguous language above quoted is found in the printed part of the instrument, and the form itself is one printed specially for the obligees, Olmsted Bros. and furnished by that firm for use by its employees.

Under these circumstances it is but reasonable to infer that the surety was led by the circumstances into believing that he was to be responsible for W. H. Edwards individually, in his "present appointment," as it was designated in the instrument, and for any liabilities incurred by said Edwards "under any future appointment or agreement whether as solicitor or agent or as joint solicitor or agent with any other persons or persons." Believing, as he did, that Edwards individually was then the

agent of the obligees, he could have understood the expression "joint solicitor or agent with any other person or persons" only as referring to the possible "future appointment" spoken of in the same sentence.

2. The main question of law submitted to the court may be thus stated:

When a surety executes a bond for the faithful accounting by a named principal as agent of the obligee, wherein the latter is described as employed in his individual character as such agent, but as a matter of fact, unknown, however, to the surety, the principal is only a member of a partnership firm which is itself the agent of the obligee, and thereafter the firm fails to account for moneys collected by it as such agent, is the surety liable on such bond to the obligee?

If, as a matter of fact, the principal, Edwards, at the time of the execution of the bond, had been individually the agent of the obligee and thereafter had taken in a partner with the consent of the obligee but without the knowledge of the surety, the surety would have been discharged from any further liability on the bond. In such event the only party that could become liable to the obligee as principal would have been the copartnership, and the surety had not undertaken any responsibility for the firm. *Sewing Machine Co., v. Brock*, 113 Mass., 194; *Insurance Co. v. Scott*, 81 Ky., 540; *Bell v. Norwood*, 7 La., 95; *Sewing Machine Co. v. Hines*, 61 Mich., 423; *London F. A. Corporation v. Bold*, 6 Q. B. 514.

It is decided in these cases that a bond given to secure an indebtedness contracted by an individual does not secure an indebtedness contracted by a partnership firm of which that individual is a member. This is really the question that was before the court in this case. In principle it is immaterial, in such case, whether the partnership existed at the time the bond was executed or whether it came into existence thereafter. It was claimed, however, that although the surety, Albers, could not be held for the indebtedness of the firm of

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Edwards & Evans, none the less he would be liable for such part of the firm's indebtedness as should be borne by Edwards. This claim, in the opinion of the court, arises from a misunderstanding of the legal characteristics of a partnership. Each member of this firm was responsible to Olmsted Bros. for the entire amount of the firm's indebtedness. It might be that in an accounting between the two partners, Edwards would be found to be indebted to his partner or *vice versa*, but by no manipulation or analysis of the business of the firm could the indebtedness of Edwards to Olmsted Bros. be made out to be anything other than the entire indebtedness of the firm. The instant that it is conceded that the surety for Edwards cannot be made responsible for the entire sum due Olmsted Bros. from Edwards & Evans, it necessarily results that he is not liable to the obligees on the bond at all. The bond secured any individual indebtedness arising between Olmsted Bros. and Edwards under the contract of employment, and nothing else. No such individual indebtedness ever arose or could arise under such contract, and the surety on the bond has nothing to answer for to the obligee.

If it had appeared that the surety, when he executed the bond, was aware of the fact that his principal, Edwards, was only the agent of Olmsted Bros. in the sense that he was a member of a firm which was itself such agent, a different question would have been presented. It is admitted, however, that the surety believed Edwards individually was the agent.

There has been no accounting between the members of the firm of Edwards & Evans. The deposition of Hubert H. Ward was read on trial wherein it appeared that—according to that witness—Evans owed the plaintiffs a certain sum and Edwards owed another sum, and Edwards & Evans, the firm, owed still another sum—all under this contract of employment. How he made this out does not clearly appear, nor has he testified to anything which indicates what sort of transactions he considered firm business and what sort he deemed business of the

individual partners. Even if it were law that a partner was not liable to a creditor for the entire firm debt but only for part of it, there is nothing in the testimony in this case by which a court or jury can determine what part of this indebtedness should be charged to Edwards and what to Evans, and the plaintiff's case would have failed for want of evidence on this point.

For the reasons herein stated, the plaintiff's motion for a new trial will be overruled.

AS TO ENFORCEMENT OF PAYMENT OF LEGACIES.

Common Pleas Court of Hamilton County.

GERTRUDE WELLS V. CHARLES E. KING.

Decided, June, 1916.

Executor—Can be Compelled to Pay Legacy Before Expiration of Statutory Period Only by Giving Bond.

A legatee under a will can not maintain an action in the court of common pleas against the executor for payment of the legacy within eighteen months of his appointment. Where the legatee desires payment of the legacy within the eighteen months period he must apply to the probate court and give bond as provided in Section 10762, General Code.

S. T. McPherson, for plaintiff.

Dempsey & Nieberding, contra.

MAY, J.

Heard on demurrer to petition.

This is an action to recover a legacy bequeathed to the plaintiff by the last will of Charles J. King. The petition alleges that the testator died in March, 1915; that the will was probated April 1, 1915, and that the defendant executors were

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duly appointed by the Probate Court of Hamilton County on that day. The legacy is for \$3,000, \$1,000 of which was to be paid within ninety days after the death of the testator and the remainder semi-annually in installments of \$500 each. Plaintiff avers that more than one year has elapsed since the probating of the will and the appointment of the executors and that the estate is perfectly solvent and after the payment of all debts, including the legacy herein sued for, there will remain a large sum of money for distribution. The petition alleges that a demand was made upon the executors for the payment of the legacy and that the executors refused to pay the same, and on April 7, 1916, this suit was filed.

Defendant executors have filed a demurrer setting forth three grounds: That the court had no jurisdiction of the person of the defendants; that the court had no jurisdiction of the subject of the action; and that the petition does not state facts to show a cause of action.

I am of the opinion that the demurrer is well taken and should be sustained.

Under Section 10762, General Code, a legatee who desires the payment of his legacy within eighteen months after the executors have given bond, can only obtain payment of the same by giving an indemnity bond, approved by the court, to the executors. The only court that is authorized under the statute to require such bond to be given and approve the same is the probate court.

This matter has been determined by the Supreme Court in the case of *Dawson v. Dawson*, 25 Ohio St., 443.

When the Dawson case was decided the creditors had four years, under the statute, to present their claims, and a legatee or distributee could not maintain an action against the executor or administrator for the payment of his legacy within the statutory period of four years without an order of the probate court requiring such payment.

On the argument, counsel for plaintiff contended that inasmuch as the petition contained an averment that all debts had been paid and that there was sufficient assets in the hands of

the executors to pay this legacy, that the plaintiff was entitled to recover.

In *Dawson v. Dawson*, page 449, the court, speaking through White, Judge, stated an averment similar to the one made in the petition was not well pleaded and that the demurrer did not admit the proof of such averment.

Under Section 10746, General Code, the time within which a creditor may file a suit against an executor was reduced from four years to eighteen months.

I am therefore of the opinion that the Dawson case controls the case at bar and that the plaintiff can not maintain an action, without alleging that there has been an order of distribution in the probate court, within eighteen months from the time of the appointment and qualification of the executors.

**CONSTRUCTION OF THE WORDS "REGULARLY EMPLOYED"
IN THE WORKMEN'S COMPENSATION ACT.**

Superior Court of Cincinnati.

STATE OF OHIO, EX REL TIMOTHY S. HOGAN (IN RE DORA KIBBY),
V. DAVID BERL.

Decided, November 16, 1916.

*Workmen's Compensation—Five or More Men Regularly Employed—
Means there Must be Five or More Employees in the Conduct of
the Business.*

The provisions of Section 13 of the workmen's compensation law, making the law applicable only in the cases of employers having in service "five or more workmen or operatives regularly in the same business," requires that the business be one in which five or more employees be regularly employed, but does not forbid changes in the personnel of the employees.

Froome Morris, Assistant Attorney-General, for plaintiff.
Eugene Adler, contra.

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GUSWEILER, J.

This cause is before the court now on a motion to take from the jury and for a verdict for the defendant on the ground that no case has been made by the plaintiff. The real issue in the case is the legal construction to be placed on Section 13 of the workmen's compensation law (103 O. L., p. 72), particularly that part referring to the law having application to such employers having in service, "*five or more workmen or operatives regularly in the same business,*" etc. What is the legal significance of "*regularly in the same business,*" etc.?

The court agrees with the opinion of the Ohio State Industrial Commission rendered by Yapple, chairman, and concurred in by Hammond and Duffy, commissioners, as found in the Industrial Bulletin, under date of December 1, 1914, on page 163, construing this very expression, as follows:

"It does not mean that the workmen must be permanently employed, but rather that there must be five or more workmen regularly employed in the business—that is, *it must be essential to the conduct of the business that five or more employees be employed.* It may be that the personnel of the employees may change, but so long as five or more *are kept employed* in the same business, then the employer comes within the provisions of this act."

The court agrees with the opinion of Attorney-General Hogan, rendered March 9th, 1912, found on page 426, Boyd's Treatise on Workmen's Compensation Law, in which Mr. Hogan says:

"A liberal construction is given the word "*regularly*" as used in this section. It is not construed to mean "*continuously.*" If an employer employs five or more workmen or operatives in the business which he is conducting during such portions of the year as conditions permit of carrying on of said business in which he is employed, he and his employees are subject to the provisions of the law."

The court is in sympathy with the workmen's compensation law and all its purposes, and believes that it should be made to

apply to all masters and employers, regardless of the number of employees employed. But the Legislature in its wisdom has limited its application solely to cases wherein the employer employs five or more workmen, and we are reluctant to make any ruling or finding which would in any manner disturb the full and complete operation and application of this law. We would rather construe every part and every section liberally, with a view to enforcing every line of the law so as to make it workable and effective toward the purposes of the act. However, applying the interpretation, theory and rule laid down in the opinion of our Ohio State Industrial Commission on this question as above cited, together with the opinion of former Attorney-General Hogan as cited, and after careful investigation and consideration, we find that we are left to no other alternative than to hold that this particular instant case at bar as proven by plaintiff, does not come within the provisions of the workmen's compensation act.

The motion will be granted.

CONDITIONS VOIDING A LIFE INSURANCE POLICY.

Common Pleas Court of Hamilton County.

THE PRUDENTIAL INSURANCE CO. v.
PIUS ZIMMER, ADMINISTRATOR.

Decided, February, 1916.

Burden of Proof—In an Action on a Policy of Life Insurance—Defense that the Insured Was Not in Good Health at Time Policy Was Delivered—Burden of Showing Such Was the Fact Upon the Company.

In an action upon an industrial insurance policy, which contains the preliminary provision, "this policy shall not take effect if the insured die before the date hereof, or if on such date the insured be not in sound health, but in either event the premiums paid hereon, if any, shall be returned," said provision is not a condition

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precedent, and if pleaded in defense to an action brought upon the policy will be considered as a condition subsequent and the burden of proof is upon the company to sustain such defense.

M. G. Heintz, for plaintiff in error.

Fulford, Shook, Wilby & Fricke, contra.

MAY, J.

This is a proceeding in error to reverse judgment rendered by the municipal court upon a verdict of the jury returned in favor of the plaintiff. The main error complained of is in the charge of the court.

The court below charged the jury that the burden of proof was upon the defendant company to establish that the deceased was not in sound health at the time of the delivery of the policy.

In support of this contention, counsel for plaintiff in error cites the case of *Insurance Co. v. Hillard*, 19 C.C.(N.S.), 78, in which it is held that a clause such as contained in this policy is a condition precedent and the burden of proof is upon the plaintiff to show that on the date of the policy the insured was alive and in sound health. The court, in deciding this case, admits that there is a diversity of opinion in the country on this question, and comes to the conclusion that the weight of authority favors the opinion announced by it, namely, that the burden of proof is upon the plaintiff.

In the case of *Prudential Ins. Co. v. Shively*, 17 C.C.(N.S.), 352, the court held:

“If the company wished to defend against the enforcement of the policy, it was its duty to have affirmatively pleaded this condition of the policy as a defense. * * * Such defenses are affirmative and must be specially pleaded.”

Our Supreme Court in the case of *Moody v. Insurance Co.*, 52 Ohio St., 12, held:

“The conditions precedent, the performance of which the plaintiff is required to plead in an action on such a policy, include only those affirmative acts which are necessary in order

to perfect his right of action on the policy. * * * Conditions which provide that the policy shall become void, or inoperative, or the insurer relieved wholly or partially from liability, upon the happening of some event, or doing, or omission to do some act, are matters of defense, and to be available must be pleaded, and their breach alleged."

And at page 18 the court says:

"If they may be properly called conditions, they are conditions subsequent, and matters of defense, which, together with their breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defense, if controverted, is, of course, upon the party pleading it."

I am, therefore, of the opinion that the condition under which it is sought to avoid this policy, to-wit, that the insured was not in sound health at the date of the delivery of the policy, is an affirmative defense, and under the rule of the Moody case, *ubi supra*, the burden is upon the company, and that the court below properly charged the jury.

Upon the whole case I am of the opinion that the question was fairly and properly submitted to the jury by the trial judge and that the verdict is not so manifestly against the weight of the evidence as to justify a reversal.

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Railway v. Express Co.

PLEADINGS SO SHAPED AS TO COVER ALL ISSUES.

Common Pleas Court of Hamilton County.

OHIO ELECTRIC RAILWAY CO. v. UNITED STATES EXPRESS CO.

Decided, June, 1916.

Pleading—Amendments Proper Which Will Make a Determination of all the Issues Possible.

An amendment will be permitted to a petition, where it tends to so shape the pleadings as to permit of a determination of all the issues presented.

*Maxwell & Ramsey and G. H. Warrington, for plaintiff.**Harmon, Colston, Goldsmith & Hoadly, contra.*

WARNER, J.

Heard on motion for leave to file amended petition.

The petition was filed on June 25, 1914, and declared on a contract between the parties made on May 1, 1909, by the terms of which the plaintiff granted to defendant the exclusive right of forwarding express matter over the lines of plaintiff for a period of ten years, and sought to recover on the alleged breach of one paragraph of said contract.

The amended petition now sought to be filed declares on the same contract and alleges the entire breach thereof, including the paragraph specifically alleged in the petition.

Said amended petition alleges that "on May 28th, 1914, the defendant having determined to go out of the express business and to liquidate its affairs, wholly without right, gave notice to plaintiff in writing that after June 30th, 1914, it would refuse to be longer bound by" said contract "and would discontinue entirely the operation of said express business over plaintiff's lines."

This is an allegation of an anticipatory breach of said contract, and the amended petition now sought to be filed might

well have been brought as the original petition in this case. *Roehm v. Horst*, 178 U. S., 1, and cases therein cited.

That case points out that two ways were open to plaintiff upon receipt of said notice of discontinuance:

1. It might treat the notice as inoperative and await the probable breach, and sue thereafter; or
2. Treat the repudiation as a wrongful ending of the contract and sue at once.

The amended petition proceeds upon the last mentioned course.

The first of above ways would not be proper or available in this case, because under Section 11368, General Code, a supplemental petition alleging a cause of action accruing after the filing of the petition is not permissible under the terms of said section. Therefore a supplemental petition was stricken from the files heretofore in this case.

Under the liberal provisions of Section 11363, General Code, as to amendments, I think the plaintiff should be permitted to file this amended petition. It is certainly in furtherance of justice that the entire case arising out of said contract and its alleged breach by defendant should be decided in one action.

I am disposed, therefore, at this preliminary stage of the case, and before trial, to permit such an adjustment of the pleadings as will dispose of all the issues that arise under said contract.

The amended petition may be filed.

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AUTHORITY OF A COURT ON MOTION FOR A FINDING AND JUDGMENT ON PLAINTIFF'S EVIDENCE.

Common Pleas Court of Cuyahoga County.

**THE H. A. STAHL COMPANY V. THE EUCLID ARCADE
BUILDING COMPANY.**

Decided, November 28, 1916.

Questions of Law and Fact—Motion for a Finding and Judgment on Plaintiff's Evidence—Should be Treated as a Motion to Direct a Verdict for Defendant—And Not as a Final Submission—Application of the Scintilla Rule.

1. Where an action at law is tried to the court and at the conclusion of plaintiff's testimony a motion is made for a finding and the judgment of the court thereon, the motion should be treated as though it were to direct a jury to return a verdict for the defendant.
2. A motion for a finding and the judgment of the court on such finding, where interposed at the conclusion of the plaintiff's evidence, should be overruled if the evidence is of such a character that, were the motion for a directed verdict for the defendant instead of for a finding and judgment, the scintilla rule would require that it be overruled.

Marvin & Marvin, for plaintiff.

M. B. & H. H. Johnson, contra.

FORAN, J.

This case comes into this court on error from the municipal court. The plaintiff in error was plaintiff below. In its statement of claim it says it is an Ohio corporation. That sometime during the month of October, 1912, H. A. Stahl & Company entered into a contract with the defendant to find or procure a tenant for the entire basement of defendant's building located under the Euclid Arcade, in consideration of certain compensation to be paid to it; and that about the 8th of November, 1912, said H. A. Stahl & Company did secure a tenant in accordance with the terms of its contract, but that the defendant wrongfully, and without just cause or excuse, refused to abide by the terms of its contract or accept said tenant; and, further, that

for a valuable consideration the claim of the said H. A. Stahl & Company was assigned to the plaintiff; and that the defendant, though often requested, refuses to pay the compensation provided for in that contract, or any part thereof.

The defendant, in its statement of defense, specifically and in detail denies all the statements and allegations in plaintiff's statement of claim, the statement of defense being practically a general denial.

I have twice read the record and exhaustive briefs of counsel in the case, and perhaps an apology is due the litigants for this tardy expression of the court's views. The questions involved, however, present unusual difficulties in view of what I am strongly inclined to believe will be the ultimate or final result of the litigation.

The claim of the plaintiff that the defendant, during the month of October, 1912, employed H. A. Stahl & Company to find a tenant for the basement of the Euclid Arcade Building, is not conclusively shown by the record; that is, the evidence offered by the plaintiff can not be said to be evidence which precludes contradiction; nor can it be said to possess such weight and force as not to admit of contradiction. But I think the sole question before the court is this: Does the evidence disclosed by the record, though not necessarily conclusive, yet not having been contradicted, warrant the court in holding that it is or was sufficient to call for the intervention of a jury to reach the conclusion the plaintiff claims the evidence justifies?

The case is one involving the right of a broker to collect commissions from a client on a contract of employment for services rendered. It is purely an action at law, triable by a jury, but the right to jury trial was waived and the case was tried to the court. At the conclusion of the plaintiff's testimony, counsel for the defendant interposed this motion: "I request the court to make a finding for the defendant, and further move that the court enter judgment for the defendant upon its finding." This motion was sustained or granted. The record is silent as to the reasons given, if any were given, by the court for its action. But it is claimed by counsel for the plaintiff in its brief, and not denied by counsel for the defendant, that the court below

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granted the motion for the reason that the plaintiff had failed to show any authority in the officers of the defendant company to enter into a contract of agency with the plaintiff company for the renting of the rooms or space in question in its building. If counsel for defendant had submitted the case to the court on the plaintiff's testimony, a reviewing court would not disturb the finding or judgment of the trial court, unless such finding or judgment was manifestly against the weight of the evidence, and that can not be said in view of all the evidence in this record. It must be held, however, that the motion of counsel for defendant was in effect a motion to direct a verdict, or what is sometimes called a non-suit.

It is quite evident, if the court denied or refused the motion of defendant's counsel to make a finding and on that finding enter judgment for the defendant, counsel who made or interposed the motion would be at liberty and would have the right to introduce evidence and make his defense. Ordinarily counsel who invoke the iron rule of the non-suit, which is practically a demurrer to plaintiff's evidence, are not willing to take the chances of the submission of the case on the plaintiff's evidence, and no fault can be found for this evidence of caution. The practice of cautious and prudent attorneys is to ask or move for a non-suit or verdict by direction, reserving the right to be heard if the motion is adversely decided. Any other course would, as a rule, be dangerous and hazardous. There are cases, however, where the courage of conviction is profitable, and the case before us we think naturally falls into this class.

It is well settled that in actions at law the rule as to non-suit or a verdict by direction is the same where the trial is by the court or by a jury. 139 Cal., 392; 61 App. Div. (N. Y.), 453. In a trial before a judge sitting without a jury, in a case where the right to trial by jury exists, a motion for non-suit or judgment for the defendant should be denied where the evidence and inferences reasonably rising therefrom are legally sufficient to prove the material allegations of the plaintiff's declaration. *Weston E. I. Co. v. Benecke* (N. J.), 82 Atl., 878. This in effect means that a motion for a non-suit or request for a finding and judgment for the defendant admits the truth of

the plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency, and the court can not grant such motion unless it can be fairly said there is no evidence in support of the material allegations of the plaintiff's petition. The judge sitting in or trying a case involving questions of fact without a jury, when a motion for non-suit is interposed, before deciding the defendant is entitled to a judgment on the plaintiff's evidence, would have to weigh the evidence as would a jury, and thus probate its value; and this, under the law in this state, he may not do. The court below evidently proceeded upon the assumption that the case was before him as upon final submission, or did not pause to consider the distinction between deciding a question of law and a question of fact.

Undoubtedly it is well settled that a corporation for profit can not act so as to be legally held liable except through its board of directors or some one duly authorized by the board or by the regulations of the corporation to act for it. Corporations are held, however, where it appears that by a course of general conduct it has permitted a person to act for it and has subsequently ratified the act of such person. The plaintiff claims its contract was made with one Edward C. Kenney, a member of its board of directors, who it claims was the manager of the defendant company. The evidence seems to clearly indicate that Mr. Kenney, in October, 1912, was in charge of the Euclid Arcade Building, in the sense that he was the only person on the premises representing the defendant. He was engaged in doing some construction work on the building and was located in what might be termed the defendant company's office most of the time, though he says he also had a private office of his own. He unquestionably had such control over the premises as to prevent trespass thereon or therein, consult with tenants and others having business with the defendant company, and see and consult with prospective tenants. Whether he had authority from the board of directors to lease or rent rooms or space in the building is clearly a disputed question. He was called by plaintiff's counsel and examined as upon cross-examination. Inasmuch as he is not a "party" to the suit, the proceeding in this

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respect seems a trifle irregular. He testified that the Guardian Savings & Trust Company was the rental agent for the building; and when asked what he meant by that, he said that the trust company had entire charge of renting the property. When asked what his duties were, he answered, "Sort of general supervision, looking after to see that the money was spent properly and not extravagantly. I simply occupy the position of looking after the enterprise and after the money that was being spent." And further he said that he had almost unlimited powers with respect to the new work in the building. And, further, "I was manager of the property for about sixteen to twenty months from the time they took over the property and started to make the changes and remodeled the building." When asked what, if anything, he had to do with the renting of the rooms, he replied: "I don't have anything to do with the renting of the property, only in connection with the Guardian Savings & Trust Company." Again, he was asked this question: "Did you ever rent any of these rooms to any one yourself?" To which he answered, "Only in conjunction with the Guardian Savings & Trust Company."

These answers or statements are inconsistent with the claim that the Guardian Savings & Trust Company was the sole or the exclusive renting agent of the defendant. There is an admission that he, Kenney, did rent rooms in this building in conjunction with the Guardian Savings & Trust Company or in connection with that company. To do a thing in conjunction or connection with another person means to do it in union or in combination or association with such person. When Mr. Kenney said he had nothing to do with the renting of this property only in connection with the Guardian Savings & Trust Company, or that he rented rooms belonging to the defendant only in conjunction with the Guardian Savings & Trust Company, there can be no inference but that he rented rooms in that way or in that manner, and in no other way or manner; that is, in no way or manner except in association or combination with the Guardian Savings & Trust Company. We think it a fair and reasonable inference that he did rent space for the defendant in association and combination with the Guardian Savings & Trust Company,

or, in other words, jointly with that corporation. Just how he acted in connection or in conjunction with the Guardian Savings & Trust Company in this respect does not appear. Evidently counsel for the plaintiff was reluctant to press the matter; and counsel for the defendant, for reasons of their own, thought it advisable not to do so. But if it is true that space or rooms in the defendant's building were jointly rented or leased, or rented and leased in connection or conjunction with the Guardian Savings & Trust Company, and such space was occupied by tenants and rent accepted by the defendant with knowledge of the facts, it may be fairly inferred that Director Kenney had authority, or at least exercised authority, recognized by the defendant, so far as renting rooms or space is concerned.

That Mr. Kenney requested the plaintiff's agent to procure a tenant for the defendant, and agreed to pay compensation or commission therefor, or for so doing, to said agent, or the plaintiff, and furnished plaintiff's agent with blue-prints of the general plan of the building, is not denied. It clearly appears that Mr. Kenney assumed authority to act for the defendant, and represented that he did have such authority, by his conduct at least; and it is admitted that Mr. Durell, the president and largest stockholder of the defendant, was informed by plaintiff, or its agent, of the consultations and talks with Mr. Kenney, and said that he would think the matter over and would consider any definite proposition made in writing. Another director of the defendant company, a Mr. Widlar, also was fully cognizant that the plaintiff was making efforts to rent certain space in the defendant's building through Mr. Kenney.

In view of all the circumstances, we are inclined to believe that it will not be seriously denied that if the plaintiff had procured a tenant wholly satisfactory to the defendant as to business and personality, such tenant would have been accepted and no question as to Kenney's authority in the premises would have been raised. A corporation can confer authority, as has been said, to bind it, by general course of conduct; and there is some evidence in the record tending to prove that the defendant company had notice and was cognizant that Mr. Kenney was negotiating with the plaintiff respecting a tenant for space in the

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defendant's building. This testimony may be somewhat weak and hazy, but that only goes to its value, and its value the court, on a motion for a non-suit, had no right to probate or weigh. It must be true, however, that where a contract is made with a broker to find or procure a tenant for an owner of a building, there is an implied understanding that the tenant shall be satisfactory to the owner if the contract is silent on that question. But the owner may not raise captious objections merely for the purpose of avoiding the performance of the contract. We apprehend that such objections should be reasonable under all the circumstances; and this of course involves a question of fact.

In view of all the facts in the record, we are of the opinion that there was, under the scintilla rule, sufficient evidence offered by the plaintiff to justify its submission to a jury if the case had been tried to a jury; and as has been seen, it makes no difference, so far as the rule is concerned, whether the case was tried to a jury or tried by the court.

The scintilla rule, as understood in Ohio, has become *stare decisis*; and in a recent case, *Gibbs v. Village of Girard*, the history, development and constant reaffirmations of the doctrine are set forth in a very able opinion by Wanamaker, J., in which he says, page 43 (88 O. S.):

“that we heartily reaffirm the doctrine.

“To hold otherwise would not only commit but permit, in a multitude of cases, a sinister and indirect invasion and usurpation of the right of trial by jury. A legislative act impairing it would be clearly unconstitutional. How, then, can a judicial order or judgment that indirectly but most effectually defeats the right of trial by jury, be otherwise than an invasion and violation of a party's rights? The right is merely to have questions of fact determined in the first instance by a jury under proper instructions of the court appropriate to the issues and the evidence. If the jury shall err, the trial judge may thereafter correct the error; and if he fail to correct it, the higher courts are still available.”

There is a clear distinction between the scintilla rule as applied in Ohio and the federal rule as found in *Pleasants v. Fant*, 22 Wall., 116. Judge Dillon in “Laws and Jurisprudence,” 130, gives the two rules, which are here quoted in parallel:

SCINTILLA RULE.

"If there is any evidence, including all reasonable inferences deducible therefrom, tending to prove each material fact put in issue indispensable to a recovery, the case must be submitted to the jury."

FEDERAL RULE.

"In every case, before the evidence is left to the jury, there is a preliminary question for the judge; not whether there is literally no evidence but whether there is any (including all the inferences which the jury can justifiably draw therefrom), upon which the jury can *properly* find a verdict for the party producing it."

The federal rule is practically the English rule. The meaning of the scintilla rule is plain. If there is any evidence, including all reasonable inferences deducible therefrom, tending to prove all the facts incumbent on the plaintiff to establish in order to maintain his action, he has a right to have the *weight and sufficiency thereof* passed upon by the jury; and it is not proper in such case, on motion to non-suit or direct a verdict, to render a judgment against him.

In the federal rule it will be noticed that the word "properly" is italicized. We give the rule just as Judge Dillon claims it to be.

There are two essential points of difference between the two rules. Under the federal rule the court is the judge of the inferences which the jury may or should draw from facts, because the rule limits the power of the jury, in drawing inferences from facts, to those which the judge may think are justifiable. The scintilla rule gives the jury the unqualified right to draw all reasonable inferences favorable to the plaintiff's case from the evidence before it. Then again, the federal rule gives the court the right to say in any case whether the jury can or can not *properly* find a verdict on the evidence before it. This right the scintilla rule denies the court where there is any evidence tending to prove the issues made by the plaintiff's pleadings. The jury might be of the opinion that it could *properly* find a verdict, but if the court is of a different opinion, that ends the controversy, for the jury would be deprived of an opportunity to express its opinion.

The federal rule, carried to its ultimate consequences, means the absolute destruction of the right of trial by the jury, as has been pointed out by Wanamaker, J.

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In *Ellis v. Insurance Company*, 4 O. S., 628, it is held in the syllabus that a motion to take the evidence given by the plaintiff from the jury may, in a proper case, be granted by the court. But the court says: "Such a motion involves an admission of all the facts which the evidence in any degree tends to prove, and presents only a question of law whether each fact indispensable to the right of action and put in issue by the pleadings has been supported by some evidence."

The opinion in this case was written by Ranney, J. He says, page 645:

"When all the evidence offered by the plaintiff has been given, and a motion for a non-suit is interposed, *a question of law* is presented whether the evidence before the jury *tends* to prove all the facts involved in the right of action and put in issue by the pleadings. In deciding this question, *no finding of facts* by the court is required, and no weighing of the evidence is permitted. All that the evidence in any degree tends to prove must be received as fully proved. Every fact that the evidence and all reasonable inferences from it conduces to establish must be taken as fully established."

It is thus seen that when a motion for non-suit is interposed, only a question of law is presented. In deciding this question of law, the court must not weigh or attempt to find the probative value of the evidence. The court could say that as a matter of law there is no evidence tending to prove all the facts involved in the right of action and put in issue by the pleadings. But the court has no right to analyze and discuss the evidence and draw inferences from facts proven in order to justify a non-suit; and if he does so he is following the federal and not the Ohio rule. When the court finds it necessary to weigh the evidence or to draw inferences from facts, the case is for the jury. It is only where no evidence is introduced by the plaintiff tending to support the issue, or where it is such as to clearly show that he has no cause of action, that it is the duty of the court to direct a verdict or a non-suit. See also 38 O. S., 392; 24 O. S., 83.

The right of a party to have the evidence passed upon by the jury is a right of which he can not be deprived; and where the

court does so, it involves the exercise of power for which, without the consent of the plaintiff, the court is incompetent. When a court undertakes to weigh evidence, his opinion is no better than that of any intelligent man on the jury.

The decision upon a non-suit, at common law, was in no case final so as to conclude the rights of either party, but the plaintiff might bring his action *de novo*. *Ellis v. Insurance Company, supra*; 1st Hand., 97. A non-suit left the plaintiff at liberty to bring a new suit. *Wright*, 420.

From 1858 to 1875 the law in this state gave a plaintiff who was defeated in an action the right to a second trial upon entering into an undertaking to the defendant to abide the judgment of the court, and perhaps paying a small jury fee.

The whole trend of judicial opinion in Ohio is to the effect that the right to trial by jury must be jealously guarded; and for that reason, if the trial court, where a case involving questions of fact is tried to him, has any doubt as to his right to grant a non-suit, the motion for such direction should be refused. And the trial court, as a rule, where cases are tried to a jury, when in doubt as to whether the plaintiff has made a case or not, always submits questions of fact to a jury.

The court has intimated that if counsel for the defendant, instead of making its motion for a finding in favor of defendant and for a judgment upon that finding, had submitted the case to the court upon the plaintiff's evidence, we would not feel at liberty to disturb the finding made by the court or the judgment thereon entered. This may seem inconsistent, but in reality it is not so. For if the case had been finally submitted to the court below, and the court had found for the defendant and entered judgment upon its findings, that judgment could not be reversed unless it was manifestly against the weight of the evidence. *Breese v. State*, 12 O. S., 146.

Before a reviewing court would be justified in setting a judgment or verdict aside for evidential reasons, it must be plainly apparent to the mind, clearly evident to the senses and free from all doubt or obscurity that the verdict or judgment is not sustained by sufficient evidence. In *McGatrick v. Wasson*, 4 O. S., 567, Thurman, J., said, quoting from *French v. Williard*, 2 O. S., 53:

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“A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter. That would be in effect to abolish the institution of juries and substitute the court to try all questions of fact.”

In the McGatrick case, *supra*, Thurman, J., further said, page 575:

“We must presume that the jury found the facts to be those above stated as necessary to make the defendant liable. Should we disturb this finding? If it is clearly wrong, we must do so. If we only doubt its correctness, we must let it alone.”

When a case is tried to the judge, if it involves a question of fact, the judge acts both as court and jury. He sees the witnesses and hears them testify and has opportunities of judging of their credibility, which the record does not afford a reviewing court. Therefore a reviewing court will not disturb a finding or judgment by the trial court unless it is clearly and manifestly against the weight of the evidence. Hence, while we are of the opinion that in the case now before us there was evidence which might properly be left to a jury, yet if the jury found for the defendant, that finding would not be disturbed by this court; and if the case had been submitted to the trial judge, we would treat it precisely as if it had been submitted to a jury.

In view of these considerations, we hold:

First, that where an action at law is tried to a judge, and at the conclusion of the plaintiff's testimony a motion is made for a finding and the judgment of the court upon that finding, the court must treat the motion as if it had been a motion to direct a jury to return a verdict for the defendant.

Second. And if, in the application of the scintilla rule, the court would refuse such motion, it must also refuse the motion for a non-suit or a finding for the defendant.

Third. We hold that the evidence as disclosed by the record was sufficient to require the submission of the facts to a jury if the case had been tried to a jury.

To state the proposition differently, we hold that, assuming the truth of all the evidence given by the plaintiff, however slight, tending to sustain its right to recover, and all inferences of fact reasonably deducible therefrom, this evidence, as we find it in

the record, is of sufficient probative force or value to enable an ordinary, intelligent man to draw a rational conclusion therefrom in support of the plaintiff's right to recover; and therefore, if the case had been tried to a jury, it would have to be submitted to the jury for determination of its weight and sufficiency if a motion to direct a verdict had been interposed, even though the judge was of the opinion that the weight of the evidence was insufficient to support the issue.

It is sometimes said if different minds of ordinary intelligence would come to a different conclusion as to the weight and sufficiency of the evidence, the determination of that weight and sufficiency is for the jury and not for the court.

The jury, if this case had been tried to a jury, probably would have found for the defendant on the evidence in this record; but that is not the question. If different minds of ordinary intelligence would come to different conclusions as to what this testimony tended to prove, the plaintiff had a right to have the issues determined and the evidence weighed as if by a jury. See *Street Ry. Co. v. Snell*, 54 O. S., 197.

At the conclusion of the plaintiff's testimony counsel asked the court for leave to amend its statement of claim with respect to the date of the original employment, and also with respect to inserting an allegation as to the dissolution of the firm of Davies, Stahl & Company and the transfer to H. A. Stahl by Davies of all interest in and to said partnership business, and a correction as to allegation and statement of claim whereby it is alleged that the original employment was with H. A. Stahl & Company, whereas it was with Davies, Stahl & Company, and to make the pleadings conform to the proof. The court granted this motion, and we think properly; and we think it wholly immaterial whether the plaintiff actually amended his pleading to conform to the proof, providing a verdict had been rendered for the plaintiff, as the journals of the court would show that leave had been granted to make the pleadings conform to the proof. Counsel for the plaintiff, however, failed to file an amended pleading, or statement of claim, and subsequently filed it in this court; and a motion is made by counsel for the defendant to strike this amended statement of claim from the

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files. This motion is granted, as this court is not concerned with anything except the question of error presented by the petition in error.

It is contended by counsel for the defendant that, under the original statement of claim, it was alleged that the defendant employed Davies, Stahl & Company, a partnership composed of Mr. Davies and Mr. Stahl, as its agents to rent the basement of its building, but that this partnership was dissolved before a tenant was secured, and transferred its assets to H. A. Stahl, doing business as H. A. Stahl & Company; that H. A. Stahl is alleged to have furnished a tenant who was willing to lease the premises upon the terms offered. It is then claimed by counsel for the defendant that where a partnership is employed as agent, a dissolution of the partnership terminates such employment. This is perhaps true; but if a cause or right of action accrues to the partnership, and that cause or right of action is assigned to the successor of the partnership, we think the cause or right of action survives, and that it does not terminate because of the dissolution of the partnership.

If, as plaintiff contends, the defendant entered into an executory contract with H. A. Stahl & Company, and at the time of the dissolution of the partnership the things provided for by the contract remained yet to be done or performed, and this executory contract was assigned to the plaintiff by the partnership, the dissolution of the partnership did not relieve the defendant or the plaintiff of responsibility for the performance of the contract. By the transfer and assignment, the plaintiff assumed the obligations of the partnership, and was responsible to the defendant for the performance of this executory contract; and if the defendant suffered any loss by the failure to perform on the part of the plaintiff, the plaintiff would be responsible therefor; and likewise the defendant would be responsible to the plaintiff if loss was suffered by the plaintiff by reason of the defendant's failure to perform under the executory contract.

The judgment of the municipal court will be reversed for error in granting the defendant's motion to make a finding for the defendant, and on that finding to enter judgment for the defendant; and the case will be remanded.

**PRIOR AGREEMENT MERGED INTO THE DEED TO
THE PROPERTY INVOLVED.**

Court of Common Pleas for Hamilton County.

H. EDMUND BIRNBRYER v. HARRY J. LEHMAN.

Decided, November 20, 1916.

*Contracts—Dwelling Built on Ground Owned by the Contractor—
Purchaser to Assume Mortgage Upon Delivery of Deed—Action for
Breach of Contract as to Compliance With Building Specifications
—Does Not Survive Acceptance of Deed.*

1. Where L entered into a contract with B, whereby L agreed to construct a house upon a lot owned by him in accordance with certain plans and specifications, for which B agreed to pay the sum of \$4,500, \$400 or \$500 of which was to be paid upon the execution of the contract, \$500 upon the completion of the house, and to assume a mortgage of \$3,500, which was to be an encumbrance on the premises at the time of the delivery of the deed, and subsequently thereto B accepted a deed for the property and entered into possession of the premises, assuming said mortgage and giving promissory notes for the balance due on the purchase price, no action for breach of the contract because of failure to comply with the specifications can survive the acceptance of the deed to and delivery of the possession of the premises, and a demurrer to a petition seeking damages for such breach will be sustained.
2. When a deed is delivered as an execution of a prior agreement, which provides for the delivery of said deed, the prior agreement is merged into the deed and no cause of action upon the prior agreement can then be had, but the rights of the parties must be determined by the deed so given in execution of the prior agreement, unless the elements of fraud or mistake are involved, or the deed was accepted under protest and with a reservation of the right to insist upon strict adherence to the terms set forth in the prior agreement.

Robert Franken, for the demurrer.

Jones & Hoover and *G. Albert Rummel*, contra.

GEOGHEGAN, J.

Heard on demurrer to the petition.

There are two causes of action in the petition. The first recites in substance that the defendant was the owner of a lot of

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land, and entered into a contract with the plaintiffs whereby he agreed to construct a house upon said lot in accordance with certain plans and specifications, for which plaintiffs agreed to pay the sum of \$4,500, four or five hundred dollars of which was to be paid upon the execution of the contract, five hundred dollars upon the completion of the house, and the plaintiffs were further to assume a mortgage of \$3,500, which was to be an encumbrance upon the premises at the time of delivery of the deed. The petition then recites that the specifications for the construction of the house were not complied with in certain respects; that the plaintiffs paid the defendant the \$400 upon the execution of the instrument; that before the delivery of the deed they gave a note to defendant for \$100, payable three months after date; that on the first day of November, 1915, the property was deeded to them and that they executed five additional promissory notes, four for \$100 each and one for \$140. Plaintiffs allege that by reason of the defendant's failure to build the house according to the specifications they have been damaged in the sum of \$700, and that therefore there is no consideration for the promissory notes that they gave defendant. For a second cause of action they seek to enjoin defendant from negotiating the said notes into the hands of innocent purchasers, and ask for a cancellation and redelivery of the notes, and their general prayer is for a judgment in the sum of \$700 for breach of the contract and an injunction as prayed for.

The demurrer filed is based upon the single ground that the petition does not state facts sufficient in law to constitute a cause of action. The demurrer is well taken.

It will be observed that the contract was to build a house upon a lot owned by the defendant. The building was to be done by the defendant according to certain plans and specifications, and upon the completion of the house and a delivery of the deed the balance of the purchase money was to be paid or secured by mortgage.

The action herein is for breach of the contract in this, that the specifications were not complied with, but it is difficult to see how an action for the breach of this contract can survive the acceptance of the deed to and the delivery of the possession of the premises.

It is a well known proposition of law that where the delivery of a deed is provided for as an execution of a prior agreement, when the deed is delivered the prior agreement is merged into the deed, and no cause of action upon the prior agreement can then be had, but the rights of the parties must be determined by the deed so given in execution of the prior agreement, unless the elements of fraud or mistake are involved, or perhaps, that the deed was accepted under protest and with a reservation of the right to insist upon a strict adherence to the terms set forth in the prior agreement.

This principle has been enunciated under varying sets of circumstances in the following cases: *Brumbaugh v. Chapman*, 15 Ohio St., 368; *Evants v. Admrs. and Heirs of Strode*, 11 O. Rep., 480, 488; *Tucker v. White*, 125 Mass., 344; *Railway Co. v. Railroad Co.*, 141 Fed., 785; *Loftus v. Read*, 31 L. R. A. (N. S.), 457; 82 Kansas, 485; *Wells v. Wells*, 40 N. Y. Supp., 836; *Leggott v. Barrett*, 15 Chan. Div., 306, 311; *Milbourn v. Lyons*, 111 Law Times Rep., 388.

The petition herein is a straight out-and-out action upon the contract for damages for the breach thereof and for an injunction to restrain the defendant from negotiating the notes. No allegations of fraud or mistake in the acceptance of the deed are made, nor are any circumstances pleaded that would show that the acceptance of the deed was not intended as an execution of the contract. In fact, an examination of the entire pleading will not show any set of circumstances pleaded other than that the deed was accepted in compliance with the terms of the contract and as an execution thereof, and this being the fact, no cause of action such as sought to be enforced here survived the acceptance of the deed.

The demurrer will therefore be sustained.

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Ex Parte Wessell.

VALIDITY OF THE CHATTEL LOAN LICENSE LAW.

Common Pleas Court of Hamilton County.

EX PARTE HERMAN WESSELL.*

Decided, March 27, 1916.

Constitutional Law—Prohibition of the Making of Loans on Chattels or Wage Earnings Without a License—Authority of Superintendent of Banks to Revoke License—Exemption of Pawn Brokers—Inclusion of Plain Notes Within the Terms of the Act—Classification—Validity of the License Act.

Sections 6346-1 to 6346-7 inclusive, as amended and supplemented (106 Ohio Laws, 281), providing for the regulation and licensing of the loaning of money without security upon personal property, and the purchasing and making of loans upon salaries or wage earnings, are within the police power of the state and constitute a valid enactment.

Miller & Foster, for petitioner.

Edward C. Turner, Attorney-General; *Charles F. Hornberger*, special counsel; *George B. Okey*, *John J. Chester* and *Hugh Huntington*, for state.

WARNER, J.

The petitioner for this writ had been arrested upon the charge of unlawfully, wilfully and knowingly engaging and continuing in the business of making loans on plain notes at a rate of interest in excess of eight per cent. per annum without first obtaining a license so to do from the Superintendent of Banks of this state and complying with the law with reference to such business. He claims that his arrest and detention is illegal on the ground that the statute under which he is charged is unconstitutional. The case was submitted on the pleadings.

*Affirmed by the Court of Appeals, without opinion, May 3, 1916.
Court of Appeals affirmed by the Supreme Court without opinion, November 21st, 1916.

The statute referred to consists of Sections 6346-1 to 6346-7 inclusive of the General Code, as amended and supplemented in Volume 106 Ohio Laws, page 281.

It is contended on behalf of the petitioner that said statute contravenes the equality and due process provisions of the federal and state Constitutions.

Section 6346-1 of said act is as follows:

“It shall be unlawful for any person, firm, partnership, association or corporation, to engage, or continue in the business of making loans, on plain, endorsed, or guaranteed notes, or due bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or of purchasing or making loans on salaries or wage earnings, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight per centum per annum, including all charges, without first having obtained a license so to do from the superintendent of banks and otherwise complying with the provisions of this act.”

Section 6346-2, in one part thereof, declares:

“The said superintendent of banks may revoke any license, if the licensee, his officers, agents, or employees shall violate any of the provisions of this act. Whenever, for any cause, such license is revoked, said superintendent of banks shall not issue another to said licensee until the expiration of at least one year from the date of revocation of such license.”

Section 6346-5 provides that:

“Nothing in this act shall apply to pawn brokers who obtain a municipal license as provided in Sections 6337 to 6346, inclusive, of the General Code, or to national banks or to state banks, or any person, partnership, association or corporation whose business now comes under the supervision of the superintendent of banks.”

Section 6346-8 declares that:

“Any person, firm, partnership, corporation or association, and any agent, officer or employee thereof, violating any provision of this act, shall for the first offense be fined not less than fifty dollars nor more than two hundred dollars, and for a second offense not less than two hundred nor more than five hun-

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dred dollars, and be imprisoned for not more than six months. The superintendent of banks upon such second conviction shall revoke any license theretofore issued to such person, firm, partnership, corporation or association.”

There are other provisions in this act prohibiting a licensee from having more than one office under the same license; requiring a licensee to furnish a borrower with a copy of Section 6346-5; making a licensee guilty of usury if he exacts interest in excess of that provided in this act; and requiring assignments of salary, wages or earnings by a married person to be signed by the consort of such person if they are living together.

The provisions of Section 6346-1 as to loans upon plain notes, the excerpts from sections of the act, and other provisions of this act referred to above are all attacked in this proceeding and alleged to be unconstitutional and beyond the lawful authority of the General Assembly.

It is unnecessary to discuss or cite well known authority as to most of these contentions. It is clear and well settled that the Legislature, under the police power, may, in its discretion, include in legislation of this sort affecting the public weal many of the provisions above mentioned. Those relating to plain notes, the authority of the superintendent of banks to revoke a license, and the exemption of pawn brokers from this act will be further considered in the order mentioned.

The act of the Legislature in question, as well as the one preceding it, is the outcome of well known extortionate practices of money lenders upon the suffering public. Skilful evasion of the previous law by those who determined to evade the spirit while they conformed to the letter of the statute doubtless led the General Assembly to include in this enactment more stringent and comprehensive provisions. And this, not because all dealers in this money traffic were unscrupulous and oppressive, but because some were. The necessity for protective legislation existed. It is apparent from the terms of the law in question that the Legislature believed that the so-called plain note device enabled the extortionate money loaner to ply his trade to the discredit of the more scrupulous and to the injury of his debtor.

Extreme methods to collect excessive interest on these plain notes could easily be employed against the poor and necessitous classes, ignorant of their legal rights and overawed by the personality of their creditor and the consciousness of obligation to him. The inclusion of the plain note in this act, therefore, prevents extortion that might be practiced. Upon these considerations, I think this provision of the law is not unconstitutional but clearly within the discretion of the Legislature.

The two provisions of the statute quoted giving the superintendent of banks authority to revoke licenses would seem to be *in pari materia* and should be construed together. When so considered it would appear to be a proper construction to hold that said superintendent might, in his discretion, revoke a license after a first conviction, especially in an aggravated case, while after a second conviction the law requires him absolutely to revoke. Be this as it may, however, if the provision in Section 6346-2, standing alone, is unconstitutional as an arbitrary and improper bestowal of power upon the superintendent of banks as claimed, this can not avail the petitioner because this provision then would necessarily be considered an independent one, and not so connected with the other provisions of the act as to be a substantive part thereof, and therefore might be excluded without rendering the remainder void. The act itself provides for the elimination of parts thereof found obnoxious to the Constitution without affecting what is left, and this is clearly a proper rule to be adopted in this instance, whatever might be the rule in a different case.

The last and more difficult question relates to the exemption of pawn brokers. This statute permits a licensee thereunder to loan on pledge of chattels although this is not his usual or principal business. He is not permitted to collect interest in advance. The loan on pledge was doubtless inserted by the Legislature in order to prevent a resort to this method by unscrupulous lenders to evade the law if framed without this provision. The pawn broker has come down to us through the centuries. He has long been under regulation of law and is now. He is defined in our statute as one who "lends money on deposit or pledge of personal property or purchases personal prop-

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erty or choses in action on condition of selling them back again at a stipulated price" (Section 6338, General Code). He must be "a person of good moral character" (Section 6339, General Code). He may be punished criminally for any violation of law relating to pawn brokers (Section 2400, General Code). Upon such conviction the mayor must revoke his license (Section 6346, General Code). It is a well known fact that loans by pawn brokers are usually of small amounts upon articles of no great value to reckless or improvident persons, with interest deducted in advance. This is the pawn broker's only business. Upon this branch of the case the contentions center upon the question as to whether or not the classification made by this statute under the circumstances violates the equal protection clauses of the federal and state Constitutions.

The manifest purpose of this law was to regulate and control a business which the Legislature considered injurious to the public welfare. The pawn broker was already under control of stringent laws applicable only to him, sufficient, it must be assumed, in the opinion of the Legislature to protect the public.

"Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Connolly v. Company*, 184 U. S., 560.

"The Legislature of a state has a wide range of discretion in classifying objects of legislation; and even if the classification be not scientifically nor logically appropriate, if it is not palpably arbitrary and is uniform within the class, it does not deny equal protection.

"Legislation may recognize degrees of evil without denying equal protection of the laws." *Company v. Martell*, 222 U. S., 225.

An act of the Legislature of New Jersey requiring persons making loans on pledges of personal property to obtain a license, but excluding pawn brokers, was held constitutional. *Dunn v. Hoboken*, 85 N. J. L., 79.

The Legislature of Pennsylvania passed a law licensing and regulating private banking and providing penalties for the violation thereof, but exempting from the operation of the act state

banks, national banks, hotel keepers, express companies, bankers who filed bonds of \$100,000, brokers, and especially persons, firms, partnerships and incorporated associations engaged in private banking continuously in the same locality for seven years, and not engaged in the sale, as agent or otherwise, of railroad or steamship tickets, as were the private banks amenable to this act. This classification was held proper. *Commonwealth v. Grossman*, 248 Pa., 11.

The board of supervisors of Spotsylvania county, Virginia, in the exercise of lawful authority adopted a regulation fixing the width of tires of six, four and two-horse wagons at six, four and three inches in width respectively, which regulation applied only to lumber and tie haulers, all other haulers being left without regulation. Held not to be class legislation, but a proper classification. The court in deciding the case says:

“When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.” *Polglaise v. Commonwealth*, 114 Va., 850.

An act of the Legislature of Indiana provided the width of entrances to coal mines, but exempted block coal mines from the provisions of the act. *Held*, a classification within the discretion of the Legislature and constitutional. *Barrett v. Indiana*, 229 U. S., 26.

The Legislature of Alabama enacted a law taxing those selling or delivering sewing machines in each county where sold or delivered, but exempted merchants selling same at their regularly established places of business. This classification was sustained. *Sewing Machine Company v. Brickell*, 233 U. S., 304.

Other cases might be cited upon this question of proper classification, uniformity of operation, class legislation, as well as other claims in briefs of counsel; but it is apparent from those cited that differences real are generally held sufficient to justify legislative classification. Substantial differences between a licensee and a pawn broker, as regulated by the laws applicable to each, it seems to me very clearly exist.

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Upon full consideration of the questions involved in this case, with the aid of the very able briefs that have been handed up, I have arrived at the conclusion that the classification made by the statute in question is fair and reasonable, based upon substantial differences, and within the discretion of the General Assembly.

Writ dismissed.

CONVERSION OF A MORTGAGED CHATTEL.

Common Pleas Court of Van Wert County.

THE CITY LOAN & SAVINGS COMPANY v. LEWIS DICKISON.

Decided, December 2, 1916.

Vendee of a Chattel—Upon Which There is a Valid Mortgage—Liable for Conversion—Necessary Allegation in an Action by the Mortgagee Against Such Vendee.

1. One who buys from a mortgagor a chattel upon which there is a properly executed and recorded mortgage, and resells said chattel to a third person without the knowledge or consent of the mortgagor or repaying said mortgage, is liable to the mortgagee in an action for conversion.
2. In an action by the mortgagee against the vendee for surrender of the chattel or payment of its value, it is not necessary to allege fraud or bad faith, or that the mortgagor is insolvent, or that there is not sufficient other property covered by the mortgage to satisfy the debt.

Cable & Cable, for plaintiff.

O. W. Kearns, contra.

STTS, J.

Heard on demurrer.

For its cause of action plaintiff says, in its petition, that on July 8th, 1915, W. G. Collins duly gave his promissory note for \$223.25, due six months from date, and, at the same time, to secure its payment, W. G. Collins gave his chattel mortgage on one gray mare, nine years old, to the plaintiff, the City Loan & Savings Company, and that said chattel mortgage was duly

filed on July 14th, 1915, with the recorder of Van Wert county, Ohio, where it still remains uncanceled, and that said note remains unpaid.

That on November 24th, 1915, said Collins, without knowledge or permission of plaintiff, sold said horse to the defendant, Lewis Dickison, who has since sold the same to some person unknown to plaintiff. That the value of said horse at the time of its purchase and resale was \$175; the plaintiff demanded of said Lewis Dickison that he either surrender said horse, so that it may be subjected to the terms of said chattel mortgage, or that he pay the plaintiff the sum of \$175, which request was refused by said defendant.

To the petition setting up this cause of action the defendant has filed a demurrer, saying that the petition does not state facts sufficient to constitute a cause of action.

The sole question presented here is whether or not the defendant, in buying the horse in question, covered by a chattel mortgage duly filed with the county recorder, and selling the horse, under the circumstances recited, can be held liable for conversion.

Conversion is any distinct act of dominion wrongfully exerted over one's property in denial of his rights or inconsistent with it.

The interest of a mortgagee, under a chattel mortgage, is that of a general owner of the property mortgaged. *Robinson v. Fritch*, 26 O. S., 659; *Root & McBride v. David et al*, 51 O. S., 29.

The plaintiff, by virtue of its chattel mortgage, was the general owner of this horse. The chattel mortgage on file in the recorder's office was constructive notice to the world of that ownership. When the defendant took said horse, under his purchase from Collins, and sold it again, he exercised acts of dominion over it which, in contemplation of law, were wrongful and in denial of the right of the plaintiff and inconsistent with such right; his acts amounted to a conversion of the horse, although he acted in good faith.

It has been argued that fraud or bad faith between Collins and Dickison should be set up in a petition of this kind. The

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question of fraud or bad faith has nothing whatever to do with the case of this kind.

It is also suggested that there should be an allegation to the effect that Collins, the mortgagor, was insolvent, or that there was sufficient other property described in the chattel mortgage so that the plaintiff in this case was not damaged. Such allegations are not necessary in this petition, but if they were a necessary part of the case the proper place to bring up such matter would be in the answer and by proper allegation.

The only question before this court is whether the petition sets up facts sufficient to constitute this cause of action. If it is necessary to bring in other parties, that too may be done by other pleadings, if the other parties are necessary and the defendant has a right to bring in other parties.

And as to the suggestion that plaintiff should set out the whole chattel mortgage, that is foreign to the question presented on this demurrer, for the demurrer admits the facts stated in the petition, and the court has nothing to consider except the facts stated in the petition, and the court assumes, for the purpose of the questions of this demurrer, that those facts are true. If it is necessary to set out the whole chattel mortgage in order to protect the defendant in his rights and in order to bring the whole chattel mortgage before the court, that too would be a matter of defense.

The case set out in the petition is clearly a case of conversion. It has been held that the owner of a chattel, or one having a special property in it, coupled with the right to possession, may follow it into whosoever's hands it may come, and make him liable in trover, if he shall have abused it, used it as his own, or done any act inconsistent with the rights of the owner, which is conversion. (See *Woolsey v. Seeley et al*, Wright, 360.)

It has also been held that:

“One who purchases of a mortgagor a chattel upon which there is a properly executed and recorded chattel mortgage, and resells the chattel to a third person, is liable to the mortgagee in an action for conversion.” *Holub v. Kirk Co.*, 23 C.C. (N.S.), 588.

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The general rule of damages for conversion is the value at the time of conversion, with interest.

The petition states a value of the horse at the time of its purchase and resale by defendant. The court is not prepared to say that the conversion took place at that time or that it took place at the time of the demand, but at any rate the time of the conversion of the property was either at the time of the sale or purchase, or at the time of the demand, and the exact time is not material for the reason that no interest is demanded.

The demurrer will be overruled and exceptions noted.

**NO RIGHT OF SUBROGATION WHERE A COUNTY HAS PAID
MONEY TO AN OFFICIAL UNDER
MISTAKE OF LAW.**

Common Pleas Court of Hamilton County.

STATE OF OHIO, EX REL JOHN V. CAMPBELL, PROSECUTING
ATTORNEY OF HAMILTON COUNTY, v. EDWARD M. BALLARD.

Decided, October Term, 1916.

Mistake—Money Paid by County to Wrong Official—Action to Recover Back—Application of the Statute of Limitations—When Such an Action Accrues—No Right of Subrogation in County—Sections 286-1, 286-2 and 286-3.

1. In an action brought by the prosecuting attorney to recover back money paid out by the county under a mistake of law prior to the passage of an act entitled "An act to amend Sections 284, 285 and 286 of the General Code, and to supplement said Section 286 by the enactment of additional sections to be known as Sections 286-1, 286-2, 286-3 and 286-4, relating to the bureau of inspection and supervision of public offices" (103 Ohio Laws, 506, passed April 17, 1913), the six year statute of limitation commences to run from the time the cause of action accrued and not from the time of the filing of the report of the bureau of inspection and supervision of public offices provided for in said act.
2. The provisions of General Code, Section 286-3 (103 Ohio Laws, 509), providing that "no cause of action on any matter set forth in any report made under authority and direction of Section 286, General Code, shall be deemed to have accrued until such report is filed

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with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof and all statutes of limitation otherwise applicable thereto shall not begin to run until the date of such filing," have no application to a cause of action that had accrued prior to the passage of said section; the provisions of Section 26 of the General Code being sufficient to continue it in effect, the statute of limitations governing the cause of action sued on at the time it accrued.

3. Where the county has paid out money under a mistake of law to one official and subsequently by a judgment of the court is compelled to pay out a further sum to another official as compensation for the same services, no right of subrogation exists in behalf of the county as against the first official.

John V. Campbell, Prosecuting Attorney, for the plaintiff.
Littleford, James, Ballard & Frost, contra.

GEOGHEGAN, J.

Heard on demurrer to petition.

The petition filed in this case is in substance as follows: The relator is the prosecuting attorney of Hamilton county, and he brings this action under the provisions of Section 2921 of the General Code for the use and benefit of Hamilton county; the defendant was from January 1st, 1908, to January 1st, 1910, solicitor for the city of Cincinnati. On January 1, 1908, John M. Thomas, Jr., was appointed by the defendant as assistant solicitor for said city, and designated to act as the prosecuting attorney of the police court of the city of Cincinnati, and was duly qualified as such and performed the duties of said position during the years 1908 and 1909, and completed his term of office on December 31, 1909; said John M. Thomas received as compensation for his services, the sum provided by the city council of the city of Cincinnati, to-wit, \$2,200 per annum. The county commissioners of Hamilton county had appropriated for the purpose of paying the salary of police court prosecutor, without designating the name of the person to whom such money was to be paid, the sum of \$800 a year; for the first quarter of 1908, the sum of \$200, being the amount due, was paid by voucher to the said John M. Thomas, Jr., and thereafter for the balance of the year 1908 and for the whole

year of 1909 the defendant herein drew the entire appropriation made by the county commissioners, amounting to \$1,399.94. On November 14, 1913, the said John M. Thomas secured a judgment by the consideration of the Supreme Court of Ohio, whereby the county commisiionsners of Hamilton county were compelled to pay him the sum so paid to the defendant herein, with interest, and on the 8th day of April, 1915, the bureau of inspection and supervision of public offices of the state of Ohio, made a finding to the effect that the said Edward M. Ballard should return the sum so paid to the treasury of Hamilton county, and it asks judgment for said amount, with interest. Or, in the alternative, should the court hold that the plaintiff is not entitled at law to the relief prayed for by reason of the running of the statute of limitations, or for any other cause, the relator prays that he may be subrogated to the rights and causes of action possessed by said John M. Thomas, Jr., on and prior to February 6, 1914, against the defendant, and being so subrogated, he prays for judgment as in the original prayer.

To this plaintiff files a demurrer setting forth four grounds, but in the view the court has taken of the case a consideration of only two of the grounds is necessary, to-wit, that the action was not brought within the time limited for the commencement of such actions, and that the petition does not state facts which show a cause of action.

It will be seen from an examination of this petition that there was a contest between Ballard, the solicitor, and Thomas, his assistant, who was designated to act as prosecutor for the police court of Cincinnati, as to who was entitled to the amount appropriated by the commissioners of Hamilton county for the purpose of paying the prosecuting attorney of the police court. The money so appropriated was paid to Ballard upon the assumption that he, as solicitor for the city, was the statutory police court prosecutor, but the Supreme Court of Ohio reversed a ruling of the common pleas court and circuit court to this effect and held that Thomas was entitled to the fund; whereupon, the county commissioners were compelled by

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reason of said judgment to pay over again to Thomas the sum they had paid to Ballard.

Now, the cause of action stated against Ballard, upon the implied promise on his part to reimburse the county for the money illegally paid him, would seem to be barred by the statute of limitations. It was money paid out by a mistake of law and under the rule adopted by the courts of Ohio prior to the passage of the act of April 25, 1908, 93 Ohio Laws, 408, could not have been recovered by an action of this kind. Since the passage of that act, however, the prosecuting attorney is clothed with power to recover back money so illegally drawn from the treasury on and after the date of its passage (*Printing Co. v. State*, 68 Ohio St., 62). But, that that act does not deprive a person who is made defendant in an action brought under its provisions, of any legitimate defense is clearly shown by the case of *State v. Fronizer*, 77 Ohio St., 7, wherein it is said by the court at page 17, in discussing the action that is provided for by the act in question:

“It does not appear that it was the intention to deprive a party who has dealt with the county honestly and in good faith, of any legitimate defense or to impose upon the court any duty to ignore the well established rules of jurisprudence and adjudge in favor of the plaintiff upon his application whether such demand violates fundamental principles of law or not. In the absence of legislative intent clearly expressed, we must conclude that none was intended.”

Now there is nothing in the act in question, authorizing the prosecuting attorney to recover back money of the county illegally paid out, that would cause one to conclude that the Legislature intended the one who had been paid money under an honest mistake of law should be deprived of the benefit of the statute of limitations. Such a construction would be contrary to all precedent in Ohio, and would be extending the operation of a statute to a point far beyond that which its terms fairly import. Therefore, it would seem that inasmuch as this action was commenced April 27, 1916, to recover back money paid out under a mistake of law on and prior to

January 1, 1910, the six year statute of limitations would constitute a bar unless the provisions of Section 286-3 of the General Code (103 Ohio Laws, 509), constitute an exception in the case at bar.

On May 8, 1913, there was filed in the office of the Secretary of State of Ohio an act entitled, "An act to amend Sections 284, 285 and 286 of the General Code, and to supplement said Section 286 by the enactment of additional sections to be known as Sections 286-1, 286-2, 286-3 and 286-4, relating to the bureau of inspection and supervision of public offices. The first sections of this act provide for the inspection and supervision of public offices and the reports to be made thereon by the officials of the state bureau of inspection; and they further provide that if the report so filed sets forth that any public money has been illegally expended, within ninety days after the receipt of such certified copy, the prosecuting attorney shall commence a civil suit to recover the same in the proper court. And Section 286-3 provides as follows:

"That no cause of action on any matters set forth in any report made under authority and direction of Section 286, General Code, shall be deemed to have accrued until such report is filed with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof, and all statutes of limitation otherwise applicable thereto shall not begin to run until the date for such filing."

It is now claimed that by reason of the provisions of this last mentioned section the statute of limitations did not commence to run against this claim until the report of the bureau of inspection and supervision of public offices was filed with reference to it, and this occurred on or about the 8th day of April, 1915. It was conceded in the argument that the cause of action against Ballard accrued when the last payment was made to him on January 10, 1910. If this be true then the principle that is well grounded in Ohio, that the statute of limitations in force at the time a cause of action accrues is the statute of limitations that governs, must be applied here. That rule is too well known to need many citations, and the court

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will content himself with citing only a few of the more important ones. *Hazlet v. Critchfield*, 7 Ohio St., Part 2, page 153; *Horseley v. Billingsley*, 19 Ohio St., 413; *Webster v. Bible Society*, 50 Ohio St., 1; *Ham v. Kunzi*, 56 Ohio St., 531; *Yocum v. Allen*, 58 Ohio St., 280.

While it is true that under the Code, Section 11236, the words contained in the Revised Statutes, Section 4974:

“This chapter shall not apply to actions already commenced, nor to cases wherein the right of action has already accrued; but the statutes in force when the action accrued shall be applicable to such cases, according to the subject of the action, and without regard to form;”

have been omitted in the Code; nevertheless, the provisions of Section 26 of the General Code would be sufficient to continue in effect in so far as a bar to this action is concerned, the statutes in effect at the time the cause of action sued on herein accrued, because the act of May 8, 1915, does not specifically provide that it shall apply to causes of action already existing at the time.

As to the prayer for relief in the alternative, to-wit, that the relator for the benefit of Hamilton county be subrogated to the rights and causes of action possessed by said John M. Thomas, Jr., against the said Ballard, I do not think that the petition presents facts sufficient to entitle the plaintiff to the equitable relief of subrogation. As I understand the rule,

“Subrogation is allowed only in favor of one who under some duty or compulsion, legal or moral, pays the debt of another; and not in favor of him who pays a debt in performance of his own covenants, for the right of subrogation never follows an actual primary liability, and there can be no right of subrogation in one whose duty it is to pay, or in one claiming under him against one who is secondarily liable, or not liable at all. In such cases payment is extinguishment.” 37 Cyc., 374.

A case almost exactly in point is one decided by the Supreme Court of New York, wherein two claimants for the same service to the United States Government applied for payment to the

government. The one who arrived first in point of time received the payment and the other was excluded. The party so excluded brought suit against the party receiving payment and it was held that he could not recover; that the money thus paid was not an appropriation for the payment of the claim of the one who was rightfully entitled to it, and that it could not be considered as a trust for such purpose. *Patrick v. Metcalf*, 37 N. Y., 332.

Applying the analogy of that case to the case at bar, here we have Thomas and Ballard both claiming a fund. Ballard does not claim it by reason of any right existing in Thomas, nor does Thomas claim it by reason of any right existing in Ballard, but each claims it as of his own right, and each claims that the county is primarily liable to him. Under a mistake of law the county pays the money to Ballard, and would be entitled to recover it from Ballard except for the intervention of the statute of limitations, as pointed out before. Thomas having been successful in his direct action against the county for the payment of the money has no further interest in the matter, and it is exceedingly questionable under the circumstances whether he would have had an action against Ballard. But be that as it may, the county is not in the position of a surety or a person secondarily liable who has been compelled to pay the debt of his principal and who asks to be subrogated to the rights of the creditor as against his principal, but is in the position of one who having a direct primary liability, pays the debt in performance of his own agreement to pay it.

I am, therefore, of the opinion that the facts as pleaded do not afford room for the application of the equitable doctrine of subrogation.

The demurrer will be sustained.

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**AS TO THE EVIDENCE REQUIRED FOR PROBATE
OF A WILL.**

Common Pleas Court of Franklin County.

IN RE LAST WILL AND TESTAMENT OF MARY DEMARIES WATTS,
DECEASED.

Decided, October 24, 1916.

Wills—Specific Number of Witnesses Not Necessary to Probate—Failure of Memory by a Subscribing Witness—Or Disposition to Testify Falsely—Not Fatal to Validity of Will, When—One Subscribing Witness May Prove Execution.

The testimony of one competent witness to a will, that all formalities necessary to its due execution were complied with by the testator and the witness, is sufficient proof, if believed, for admission of the will to probate, notwithstanding the other witness to the will fails to remember or denies compliance with one or more of the essential statutory requirements to its due attestation.

Luckhart & Glick, for petitioners.

N. W. Dick, contra.

ROGERS, -J.

The probate court of this county having refused to admit the paper writing purporting to be the last will and testament of Mary DeMaries Watts to probate, the matter has been appealed to this court, pursuant to statute, to determine whether or not such paper writing shall be so admitted.

The witnesses to the will, as well as Gertrude Marie Bland, the sole devisee thereunder, came before the court and were examined touching the execution of such will, and the court has had the testimony reduced to writing. The paper writing purporting to be her will was laid before the court, and its contents examined.

The statute, Section 10505, General Code, relative to the execution of wills, other than nuncupative wills, provides that every

such will "must be in writing," and "be signed at the end by the party making it * * * and be attested and subscribed in the presence of such party by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge it." And relative to the probate of wills the statute also provides:

"Section 10516. The court shall cause the witnesses to the will, and such other witnesses as any person interested in having it admitted to probate desired to come before the court. Such witnesses shall be examined in open court, and their testimony reduced to writing and filed."

"Section 10519. If it appears that such will was duly attested and executed, and that the testator, at the time of executing it was of full age, of sound mind and memory and not under restraint, the court shall admit the will to probate."

It appears from the evidence of the two witnesses to the will, as well as the will itself shows, that both witnesses attested the paper as the last will and testament of Mary DeMaries Watts, and subscribed their respective names thereto as such attesting witnesses; that the testator at the time of such attestation was of lawful age, of sound mind and memory and not under any restraint. One attesting witness, S. W. Sherwood, testified, in substance, that he saw Mary DeMaries Watts subscribe her name Mary DeMaries Watts to the will, and he also heard her acknowledge it. He also testifies, in substance, that the other witness, S. H. Kingry, was present at the time she affixed her signature to the instrument and that she acknowledged it as her will in his presence and hearing. Kingry, however, denies that she affixed her signature in his presence, or that the signature of Mary DeMaries Watts was on the paper when he attested the instrument, although he knew and understood at the time that he affixed his own signature, that he was attesting her will. Apparently the witness, Kingry, had fairly good eyesight and hearing, and there was nothing to prevent his seeing and hearing all that transpired during the execution of the paper.

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Both of the attesting witnesses do not by their testimony produce proof of every material fact necessary to the due execution of the will. But the one attesting witness, S. W. Sherwood, makes proof not only of the signing and acknowledging of the will by the testator in his presence, and his own attestation of his signature in her presence and at her request, but also of the signing and acknowledging of her will by the testator in the presence and hearing of the other attesting witness, S. H. Kingry; and of the latter's attestation of her signature in her presence and at her request. In other words, S. W. Sherwood makes proof of the due execution of the will so far as he and she were concerned, as well as its due execution so far as she and the other witness were concerned.

The question therefore is whether the testimony of one competent witness to the will, who testified to all the formalities by the testator and both attesting witnesses to the due execution of the will is sufficient proof, if believed, to admit the will to probate, even though the other witness to the will fails to remember, or denies compliance by the testator with one or more of the essential statutory requirements to its due execution.

While the statute relative to probating wills (Section 10516, G. C.) requires the court to cause the witnesses to the will to come before the court and be examined and their testimony reduced to writing and filed, the statute does not require the will to be proved by the testimony of such witnesses. In truth, the due execution of the will may be proved and the will admitted to probate by witnesses independent of, and even in contradiction to the testimony of the attesting witnesses. The law does not require a will to be proved as well as attested by a specific number of witnesses. A will may be proved by one witness, though it must be attested by two. In other words, the number of witnesses required to prove a will may be less than the number of subscribing witnesses demanded by the statute: *Jesse v. Parker*, 6 Gratt., 57; *Cheatham v. Hatcher*, 30 Gratt., 56; *Lindsey v. McCormack*, 2 A. K. Marsh, 229; *Lamberts v. Cooper*, 29 Gratt., 61; *Hall v. Sims*, 2 J. J. Marsh, 509; *Harper v. Wil-*

son, 2 A. K. Marsh, 465; *Mickle v. Matlack*, 17 N. J. L., 86; *Webb v. Dye*, 18 W. Va., 376; *Crusoe v. Butler*, 36 Miss., 150.

Proof of a will by one of the attesting witnesses is sufficient if he can testify to a compliance with all the requirements of the statute as to the execution, acknowledgment and attestation. Any one of the subscribing witnesses may prove the execution of a will and its due attestation by himself and the others; and if his testimony is satisfactory, it is sufficient. *Dewey v. Dewey*, 1 Metc. (Mass.), 349; *Craig v. Craig*, 156 Mo., 358; *Matter of Bernsee*, 141 N. Y., 389; *In re Skinner*, 40 Orig., 571; *McKee v. White*, 50 Pa. St., 354; *In re Matz*, 136 Calif., 558. See also 40th Cyc., 1306, and cases.

If the law were otherwise than as above indicated, every will and its due execution would be at the mercy of the subscribing witnesses either to sustain or overthrow it at pleasure. Hence, the law does not permit one attesting witness, by failure of memory, or false swearing or the like, to defeat the will of the testator; but the testimony of the witnesses, whether one or more, and the surrounding circumstances, if they show that all the solemnities required by statute in the execution of the will have been observed, will be sufficient, if believed, to admit the will to probate.

Counsel opposing the will in the main relies upon *Keyl v. Feuchter*, 56 Ohio State, 424. This case, however, only decides what are the essentials to the admission of a will to probate, and does not decide the question as to whether the testimony of both attesting witnesses is necessary to establish the will.

The question in the case at bar is one of the quantum of proof essential to admit a will to probate, and not alone one as to the essential facts necessary to be established by the proof in order to admit such will to probate. The fact to be established is the proper execution of the will. If that is proven by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony or their absence is explained. The

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inquiry is whether, taking all the testimony together, the fact of the due execution of the will is well established. It is not required that any one or more of the essential facts should be proved by all, or any number, of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be.

From the evidence adduced, including all the circumstances surrounding the execution of the will, I am of opinion that the paper writing purporting to be the last will and testament of Mary DeMaries Watts is satisfactorily shown to be her last will, and the same is entitled to be admitted to probate, and it is so ordered.

WHEN MECHANICS' LIENS BEGIN TO RUN.

Common Pleas Court of Hamilton County.

PHINEAS S. PHILLIPS V. BRAHAM & COMPANY ET AL.

Decided, November 20, 1916.

Mechanics' Liens—Time Within which Statement Must be Furnished to Owner—Affidavit for Lien Must be Filed Within Sixty Days—When the Sixty Days Begins to Run.

1. The sworn statement required by the provisions of Section 8312, General Code (103 Ohio Laws, 371), to be served on the owner in order to perfect a mechanic's lien upon the owner's premises, is not required to be served prior to the time of filing the affidavit for lien in the office of the county recorder, but may be served at any time before the time to file the lien expires, the lien not becoming effective until the statement is served.
2. In order to perfect a mechanic's lien under the provisions of the mechanics' lien law (103 Ohio Laws, 371), the affidavit for lien must be filed in the office of the county recorder within sixty days after the completion of the work for which the lien is attempted to be taken.
3. Where a material-man furnishes material for the construction of a building during the summer of one year and in the next year an

additional order is given for the same kind of material for the purpose of patching up certain damages to the building occasioned by the elements during the course of the winter, the time for filing the lien can not be held to begin to run at the time the latter portion of material was furnished, but must be held to have begun to run from the time the main portion of the material was furnished, and hence an affidavit for lien filed within sixty days of the time when the material for repairs was furnished will not be effective to create a lien upon the premises for the entire amount of material furnished.

Herrlinger & Dixon, for the building association.

George E. Mills, for Henry Portmann.

Miller & Foster and *Henry K. Gibson*, for William Kramer.

James M. Stone, for Frank Seilkop.

John W. Sadlier, for H. W. Johns-Manville Co.

GEOGHEGAN, J.

Heard on the question of priorities as between persons claiming mechanic's liens and the Exposition Building & Loan Company, mortgagee.

1. Henry Portmann, a sub-contractor, claims a mechanic's lien on each of the lots in question, one for \$70 and the other for \$110.

The question for determination is, whether or not the said Portmann perfected his lien in accordance with the provisions of the mechanic's lien law (103 O. L., 371), and particularly Section 3 thereof, now known as Section 8312, General Code.

Portmann filed his lien on November 2, 1914, in the office of the county recorder of this county, about at 3:55 p. m. This was the last day upon which he could file it in order to secure the protection of the said mechanic's lien law in so far as that part of the work for which he is claiming a lien of \$70 is concerned, the work having been finished on September 3, 1914. As to the work for which a lien of \$110 is claimed, that was completed on September 14, 1914, and the sixty-day limitation in the lien law would not have run against it until November 13, 1914. On November 2, 1914, at about 5:05 p. m., Portmann

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served notice of his liens upon the owner, Braham, and also at the same hour and date delivered to Braham a sworn statement, in accordance with the provisions of the act.

The only question raised as to the validity of these liens is whether or not the sworn statement, which is claimed to be required by the provisions of Section 8312, General Code, should be served on the owner prior to the time of filing the lien in the office of the recorder.

It is conceded by counsel that inasmuch as the now existing Ohio mechanic's lien law is substantially the same as the Michigan statute on the same subject, the decisions of the courts of the state of Michigan, construing the Michigan act and its operation, should largely control the court in the construction of the Ohio statute and its operation, under the familiar principle that when the statute of another state has been adopted into our legislation, the known and settled construction of such a statute by the courts of that state should be considered as silently incorporated into the local act (*Favorite v. Bookers*, 17 Ohio St., 548; *Brice v. Myers*, 5 Ohio, 121). And it is only when a different policy is required or the reasoning of the courts seem to be unsound, that the construction of the statutes of the other states by their own courts will be disregarded here.

If this principle be true, then this question has been squarely decided by the Supreme Court of Michigan in the case of *Holiday v. Mathewson*, 146 Mich., 336, wherein it is held as follows (first proposition of the syllabus):

“Delay in serving upon the owner the statement required by Section 10713, 3 Comp. Laws, until after the claim of lien required by section 10714 has been filed in the office of the register of deeds, is not fatal to a mechanic's lien, where the statement is served before the time to file a lien expires, the lien not becoming effective until the statement is served.”

The court held that there is nothing inconsistent with this holding in the various Michigan cases cited to the court, which were also cited to this court in the present instance.

The mere fact that the office of the recorder closes at four o'clock in this county, is not sufficient of itself to raise a different construction of the statute. It is a matter of common knowledge that regulations as to the closing of the recorder's office differ in the various counties of the state; and the county recorder, in the present instance, in order to accomodate Portmann's attorney, might have kept his office open until midnight and the filing of the affidavit would have been in time. Therefore, as the time in which the lien could have been perfected was until midnight of November 2, 1914, the decision in *Holiday v. Mathewson*, *supra*, may be regarded by this court as controlling, and the lien will be sustained.

The statement was made that our own court of appeals has in effect held that it is not necessary for a sub-contractor to file the kind of statement that has been discussed herein.

It is not necessary for me, in view of the conclusion I have come to, to pass upon the matter, and I expressly disavow any intention to do so.

2. As to the claim of Frank Seilkop, for a lien for sodding and grading, it appears that the work was completed on June 27, 1915, and the affidavit for lien was filed in the recorder's office on October 19, 1915. As more than sixty days had elapsed between the time of the completion of the work and the time of the filing of the affidavit for the lien, the said Seilkop can not have any priority over the lien of the mortgage of the building association.

3. As to the claim of William Kramer, it appears that all of the work he was required to do was completed in August, 1914, and that he did not file his affidavit for lien until the 7th day of May, 1915. As more than sixty days had elapsed, the same ruling must be made concerning his claim as was made in the claim of Seilkop.

4. As to the claim of the lien of the H. W. Johns-Manville Company, it appears that during the late summer and fall of 1914, the said company furnished material for the white stucco that was used for the exterior of the buildings; that all of this

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was furnished in 1914, except that in February, 1915, a small portion of white asbestos stucco was furnished. It appears, however, that this last delivery was made upon an order just preceding the time of its delivery and that at that time the houses had been completed, one of them was occupied, and the purpose of furnishing this small portion was simply to make some repairs where the elements had damaged the property during the course of the winter. The lien of the company was filed on April 2, 1915. This lien can only be held valid in case one would be able to tack on the small portion of white stucco to the great amount that was furnished in 1914 and assume that it was all furnished for the erection and construction of the buildings. Such a construction would be entirely contrary to the spirit of the mechanic's lien law, and the court now expressly finds that the stucco furnished in the construction of the buildings, as distinguished from repairs, was furnished more than sixty days prior to the filing of the lien, and therefore the lien can not be held to be valid.

Therefore, the finding of the court is, that the lien of Portmann is prior to the lien of the building association, but that the attempted liens of Seilkop, Kramer and the Johns-Manville Company are not.

**LESSOR RAILWAY COMPANIES EXEMPT FROM THE
FRANCHISE TAX.**

Common Pleas Court of Franklin County.

STATE OF OHIO V. THE LITTLE MIAMI RAILROAD COMPANY.

Decided, November 17, 1916.

*Taxation—Construction of the Hollinger Law—With Reference to
Exemption in Case of Railways Operated by a Lessee—Section
1465-1, et seq.*

A railway company which has leased its line to an operating company is exempt from payment of the state franchise tax, where the operating company is required to and does report and pay the excise tax.

Edward C. Turner, Attorney-General, for plaintiff.

Henderson & Burr, contra.

BIGGER, J.

This submission of the case is upon the general demurrer to the answer of the defendant, which contains two separate defenses. I shall not take the time to state the substance of the pleadings except to say that the action is brought to recover from the defendant company the franchise tax provided for in what is known as the Hollinger law (102 O. L., 224). This act was a consolidation and revision of the Cole law (95 O. L., 136-143), the Willis law (95 O. L., 124-128), and the Langdon law (101 O. L., 399-425). The defendant is an Ohio corporation, and in 1869 leased its line of railroad to the P., C., C. & St. L. Railway Company, and ever since that date said last named company has maintained and operated the defendant's line of railroad under the terms of that lease. It is also set out in the answer that for the period for which it is sought to hold the defendant for the payment of this franchise tax, its lessee paid the excise tax provided for by the Hollinger act, and this brief statement is sufficient to indicate the question upon which the parties are in dispute, to-wit, whether the payment by the lessee

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company of the excise tax imposed by the terms of the Hollinger law exempts the defendant corporation from the payment of the franchise tax.

Very elaborate briefs have been filed and these together with the statute itself have been given careful consideration. I do not deem it necessary to state *in extenso* the many arguments advanced by counsel in their brief based upon the provisions of this act and the decision of the higher courts upon the similar question arising under the provisions of the Willis act, but will content myself with a brief statement of the result of my deliberations. In my opinion it is unnecessary to call to our aid in the true interpretation of this statute, in so far as it affects the question here at issue, more than two or three of the sections of the act itself.

The Willis act, which first imposed upon the corporation this franchise tax to be computed upon its subscribed or issued and outstanding capital stock, did not make any reference to public utilities as such, but prior to its passage, by several independent acts, an excise tax had been levied upon public utility corporations, covering practically the entire field of such activities. The Willis act, which provided in general terms that this franchise tax should be paid by all corporations for profit, both foreign and domestic, exempted from its operation those public utility corporations upon which the state by legislative act had already imposed an excise tax, but without designating them as public utility corporations. It had already become the policy of the state, as declared in the several acts imposing this excise tax, to impose such tax upon public utility corporations, and it was public utility corporations which were exempted by Section 7 of the Willis act from compliance with its terms. When it came to the revision and consolidation of the Willis, Cole and Landon acts into the Hollinger law, the Legislature saw fit to make use of and define the term "public utility." Section 39 of the Hollinger act thus defines a public utility:

"The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and associa-

tion, their lessees, trustees, or receivers, elected or appointed by any authority whatsoever and herein referred to as express company, telephone company, telegraph company, electric light company, gas company, natural gas company, pipe line company, water works company, messenger company, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railroad company, suburban railroad company, and interurban railroad company, and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms or individuals or associations."

The provisions of the Willis act, as carried into the Hollinger act, beginning with Section 106 and continuing to and including Section 132, required all corporations for profit to make a report as therein provided to the tax commission and to pay this franchise tax, but by Section 129 of the act exempts certain public utility corporations from compliance with its provisions. The language of this section is as follows:

"An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act * * * shall not be subject to the provisions of Sections 106 to 115 inclusive of this act."

This exempts, by its terms, incorporated companies whether they own or operate a public utility when they are required as public utilities to file reports and to pay an excise tax upon their gross earnings. It will be observed that this exemption extends to all those incorporated companies which are required as public utilities to do this, and it becomes necessary therefore to examine the definition of the term "public utility." The definition makes it include and embrace each corporation and its lessees. Referring again to the exemption Section 129, it will be observed that it exempts each incorporated company, whether owner or operator of a public utility, when *as such* it is required to file reports and pay the excise tax. If public utility

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embraces both the owner and the lessee, as it does by force of the definition, then if either the owner or lessee is required to and does report and pay the excise tax it seems clear to me that as a public utility it has reported and paid the excise tax.

It is a well known principle of statutory construction that effect shall be given if possible to each and every part of the act, and the Legislature must be supposed to have had some purpose in view in using the words "*as such*" in this exempting section. There would be more color for the contention made on behalf of the state if the exemption had read "an incorporated company whether foreign or domestic, owning or operating a public utility in this state, required by law to file reports and so forth," but instead of so providing the Legislature added the words "*as such*"—that is, as a public utility required to report, and the public utility embraces both the owner and the lessee and it is immaterial to the state which reports and pays, so that the excise tax provided for is paid by the public utility, which embraces both the owner and lessee. These words, "*as such*," must be given some force and effect, and it appears to me clear that it was the legislative intention that, whenever the owner or operator of a public utility is required to report and pay the excise tax for the public utility, both are exempt from the requirement to report and pay the franchise tax. If that be not its meaning then I can not see what the Legislature meant by the use of the phrase "*as such*." It does not provide that when it is required to report as an incorporated company it shall be exempt, but when an incorporated company, either owning or operating a public utility, reports and pays as a public utility it shall be exempt, and public utility embraces both the owner and the lessee. So that it in effect says "when an incorporated company (as the defendant) as a public utility (which embraces its lessee as well as itself) is required to report and pay the excise tax it is exempt. Therefore as the lessee (its *alter ego*) is required to report and pay, it is required to report and pay and is therefore exempt.

But it is said that this defendant is not a public utility corporation within the definition of the statute for the reason that

the defining statute specifically names the classes of corporations referred to as public utilities and amongst these classes is that of railroad companies, and that by further definition, contained in Section 40 of the act, the defendant is not a railroad company. Section 40 of the act does define the meaning of a railroad company as used in this act in this language:

“When engaged in the business of operating a railroad company either wholly or partially within this state on rights of way acquired and held exclusively by such company or otherwise is a railroad company.”

It is contended because the defendant is not engaged in the operation of a railroad that it is not a railroad company. I am unable to reach this conclusion. In my opinion the Legislature did not mean to make the operation a controlling feature of this definition. In defining each and every public utility named in Section 39 the definition begins with the same language, to-wit: “When engaged in the business of,” and this phrase in every case is followed by the words: conveying to, transmitting to, operating, furnishing, supplying, transporting, etc. So that if the construction contended for by the Attorney-General be correct, then in every case where a public utility has become insolvent and passed into the hands of a receiver and is being operated by the court, the state will be authorized to levy this franchise tax upon the insolvent corporation, while solvent corporations are exempt.

This construction leads to an absurdity. It certainly was not the legislative intention to thus add to the burdens of corporations which are already insolvent and indeed without assets from which to make payment of such a tax. The manifest purpose of Section 40, which defines the several utilities named in Section 39, is to make clear what is intended to be included within the general terms used in designating the public utilities named in Section 39. As to some of them, as for instance a railroad company, there would seem to be little need of definition. But that is not true as to all of them. Take for instance the term, “sleeping car company,” the definition makes this cover sleep-

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ing, palace, parlor, chair, dining or buffet cars. Take the term "equipment company" used in Section 39. It would be entirely indefinite without the definition. The same is true of a signal company, heating company and cooling company. The manifest purpose of Section 40 was to make clear what is included within these terms and it was not, in my opinion, intended to say that a railroad company, when it passes into the hands of a receiver, or executes a lease and is not longer operating its own road, is no longer a railroad company; nor that a telephone company or a telegraph company, when a receiver is appointed to take charge of its property, thereupon ceases to be a telephone or telegraph company.

To put the construction upon this language which is claimed for it by the Attorney-General, leads to such absurd results it seems clear to me that no such meaning was intended. I conclude, therefore, that a fair and reasonable construction of the language of Section 129 of the act, taken in connection with Section 39 of the act, leads to the conclusion that it was the legislative intent to exempt railroad corporations which have leased their lines to an operating company which is required to and does report and pay the excise tax provided by this act.

There are other considerations which lead to the same conclusion. One of these is the manifest injustice of imposing this third tax upon public utilities which have already paid a property tax and an excise tax, and that this was recognized as an injustice by the Legislature is apparent from the fact of the exemption itself. It is said, however, in reply to this, that unless this franchise tax is imposed upon the defendant corporation that it will escape taxation altogether. That argument is more specious than sound. The only source from which a public utility, such as a railroad company, can derive funds for the payment of taxes is its earnings, and whether these earnings are divided between two companies or go entirely to one, the earnings are the only source from which the taxes can be paid, whether paid by the one company or be divided between two companies and paid by the two. The burden falls upon the earnings of the road in both cases, and when a lease of a railroad

is made by an owning company, the tax, in every case, will necessarily be taken into consideration in the making of the contract itself; so that it can not be said in any true sense that the owning company escapes taxation entirely, nor is there any apparent reason why the Legislature should make discrimination in taxation against those public utilities which are being operated by a lessee, since it is not the policy of this state, as evidenced by its legislation, to discourage the leasing of railroads.

There is another consideration also leading to the same conclusion. It was decided by the court of appeals in the case of *State v. Cleveland & Pittsburgh Railroad Company*, 20 C.C. (N.S.), 61, that such owning railroad companies were exempt from the franchise tax by the terms of the Willis act. It is an established principle governing the construction of statutes, that where they have undergone revision, that the same construction will be given to the statute after revision as before, unless the language of the amended act plainly requires a different construction. In my opinion, the language of the Hollinger law not only does not plainly require a different construction, but, as I read these acts, it appears that the language of the Hollinger law makes plainer than the language of the Willis act that it was the intention to exempt such companies as the defendant from the payment of this franchise tax.

I conclude, therefore, that the answer of the defendant does state a defense to the claim made in the petition, and the demurrer is overruled.

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ACTION AGAINST THE GUARANTOR OF A NOTE.

Common Pleas Court of Montgomery County.

A. H. WALKER v. J. E. WOLF AND C. J. BUEKER.

Decided, December 22, 1916.

Promissory Notes—Liability of a General Guarantor—Not Dependent Upon the Insolvency of the Maker—Contract of Guarantor Distinct from that of Maker, When—Misjoinder.

1. The liability of one who enters into a general guaranty for payment of a promissory note is absolute and is in no way affected by the question of the solvency of the maker.
2. Where an endorsement of guaranty is made subsequent to the making of the note and by one who is not at the time an indorsing holder thereof, his liability as guarantor is under a contract separate and distinct from that of the maker of the note and he can not be joined in the action against the maker.

Jones & Kemper and John Edwards, for plaintiff.

Powell & Howell, contra.

SNEDIKER, J.

This case is before the court on a general demurrer to the petition. The allegations of the petition are that the defendants, J. E. Wolf and C. J. Bueker, are indebted to the plaintiff in the sum of \$500 with interest on a promissory note, a copy of which is incorporated in the body of the petition. The liability of Wolf arises from his relation to the plaintiff as maker of the note. The liability of Bueker arises from an endorsement on the note in these terms:

“For value received, we jointly and severally guarantee payment of within note and interest and waive demand and protest and notice of non-payment and protest.

“C. J. BUEKER.”

The point made by counsel for defendant Bueker on the demurrer is that it is the duty of the plaintiff to first exhaust his remedy against the maker Wolf before he looks to the guarantor Bueker, on the theory that unless the maker fails to pay

the note when it is due and is then entirely insolvent and bankrupt, the guarantor does not become liable.

The copy of the note with its endorsements as found in the petition indicates that Bueker is not an endorser, but on the contrary has simply entered into a general guaranty for payment. The case of *Stone v. Rockefeller*, 29 O. S., 625, referred to by counsel for Bueker, is not one of general guaranty for payment, but is a guaranty of collectibility, and as between such a guaranty and one for general payment there is a wide distinction. The force and effect of a general guaranty is stated by Daniel in the second volume of his work on Negotiable Instruments, at Section 1769:

“If A guarantees expressly or by implication to pay the note of B to C provided B does not pay it, he becomes absolutely liable for its payment immediately upon B’s default and is therefore deemed an absolute guarantor of the due payment of the note by B to C.”

His liability being absolute, no question as to whether or not the maker is insolvent or bankrupt is recognized as affecting such liability. The allegations of this petition are that the note is due from Wolf and unpaid. In view thereof, the liability of Bueker has arisen and an action is maintainable against him.

But another very grave question has presented itself to us with regard to the form of the petition. Are or are not separate causes of action against several defendants improperly joined? It is a general rule that a pleading must be taken most strongly against the pleader. There is nothing said in this petition as to the time when Bueker indorsed on the back of the note his guaranty. Our Supreme Court in the case of *Bright v. Carpenter, and Schurer*, 9 Ohio Reports, 139, hold that:

“When a stranger to a promissory note indorses it in blank at the time of making it, the payee of the note may sue him with the maker as a joint maker of the note. But if a person not a party gives his name to a note already existing, his engagement is collateral only and he is held as guarantor.”

In the 16 Ohio, at page 1, our Supreme Court held that:

“The guaranty of the fulfillment of the contract written below the contract and executed at the same time subjects the

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guarantor as an original contractor and a suit may be entertained against both parties jointly or against either severally.”

And, in the case of *Gale's Administratrix v. Van Arman and Hopkins*, 18 Ohio Reports, page 336, the Supreme Court in the syllabus say:

“Where a stranger to a note payable in clocks at the time of the execution wrote upon the back and signed these words, ‘I guarantee the fulfillment of the within contract,’ held: that the instrument with its indorsement was a joint contract and that the parties might be sued jointly upon it.”

This defendant, Bueker, is not in the position of Clay in the case of *Isaac Clay and John Hoot v. Chester Edgerton*, in the 19 O. S., page 549; nor is he in the position of Lewis & Brothers in the case of *Peter Kautzman et al v. Jesse Weirick et al*, 26 O. S., 330. Clay and Lewis & Brothers, in these several cases, were indorsers who at the time of the indorsement and transfer of the instruments involved made the guaranty upon which the Supreme Court held they were liable jointly with the maker because of the fact that they were such indorsers and transferers of the note as well as guarantors.

If Bueker, *after* the making of the note of October 1, 1915, made his indorsement of guaranty, his indorsement not being that of an owner and holder transferring the note, his liability as such guarantor is under a contract separate and distinct from the contract made by Wolf as maker of the note. In that event, there are in this petition separate causes of action against several defendants improperly joined. 8 N. Y. Rep., 207; 10 Barber, page 638.

In Pomeroy's Remedies and Remedial Rights, at Section 409, the author says:

“It has been decided in many cases and undoubtedly the weight of authority sustains this ruling, that a guarantor and the principal debtor can not be sued together in one action, even though the guaranty be written upon the same paper with the agreement which it undertakes to secure. It is said that the principal debt and the collateral undertaking do not constitute one instrument and the parties, therefore, do not come within the language of the statute.”

The authorities here collected are sufficient to indicate that a guarantor is jointly liable with the maker only when he executes such guaranty at a time when as indorser he is transferring the note to another, or at the date of the making of the note; and that if the guaranty is executed under different conditions it becomes a separate contract, and a separate cause of action exists against the guarantor from that arising by virtue of the note against the maker, and the guarantor's liability is neither joint nor joint and several with that of the maker.

Without an averment in this petition to the effect that at the time of the making of the note by Wolf to Walker the note was indorsed with the guaranty of Bueker, our opinion is that no action may be brought against Wolf and Bueker jointly. If the plaintiff can not make such an averment, he is entitled to proceed against either Wolf or Bueker separately; in the one case for the collection of his note, in the other for a realization on the liability of the guarantor.

While the demurrer is general, yet for the purposes of the case we believe it should be taken as one, on the ground that separate causes of action against several defendants are improperly joined, and, so taken, should be sustained.

CONSTRUCTION OF RAILWAY TARIFF PROVISIONS.

Common Pleas Court of Hancock County.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY v.
THE MILLER CITY TILE CO.

Decided, September Term, 1916.

Rates on Interstate Freight—Shipper Can not Profit from Mistake of Carrier's Agent—Class Tariffs and Commodity Tariffs—Ascertainment of Legal Rate to Points Not Named in the Schedule.

1. The rates for the transportation of interstate freight when once lawfully established are unalterable, either by the shipper, the carrier, or both; and the Interstate Commerce Commission alone has power originally to entertain proceedings attacking the same as unreasonable.

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2. The mistake of the carrier's agent in naming a rate is no bar to an action against the shipper for an undercharge.
3. A "class" tariff provides rates applicable to all classes of freight and to all points where the same has not been modified or specially provided for by special action known as the "commodities" tariff.
4. The inhibition of Section 4 of the Interstate Commerce Act against the greater charge for a longer distance is modified by the latter provision which allows the commission to authorize the carrier in special cases to charge less for a longer than a shorter distance, and to prescribe the extent to which the carrier may be relieved from the operation of the act.
5. Every provision of the tariff must be given effect, if possible, and where a general provision is followed later by a special, the latter must be held a modification of the former. Accordingly, where the tariff provides a rule whereby the rate for the next more distant point is to apply to points not named in the schedule, an exception is made as to a given point by the use of a reference in the schedule to a contrary provision as to said point. If this occurs in the "commodities" tariff, resort must be had to the "class" tariff to determine the rate applicable.

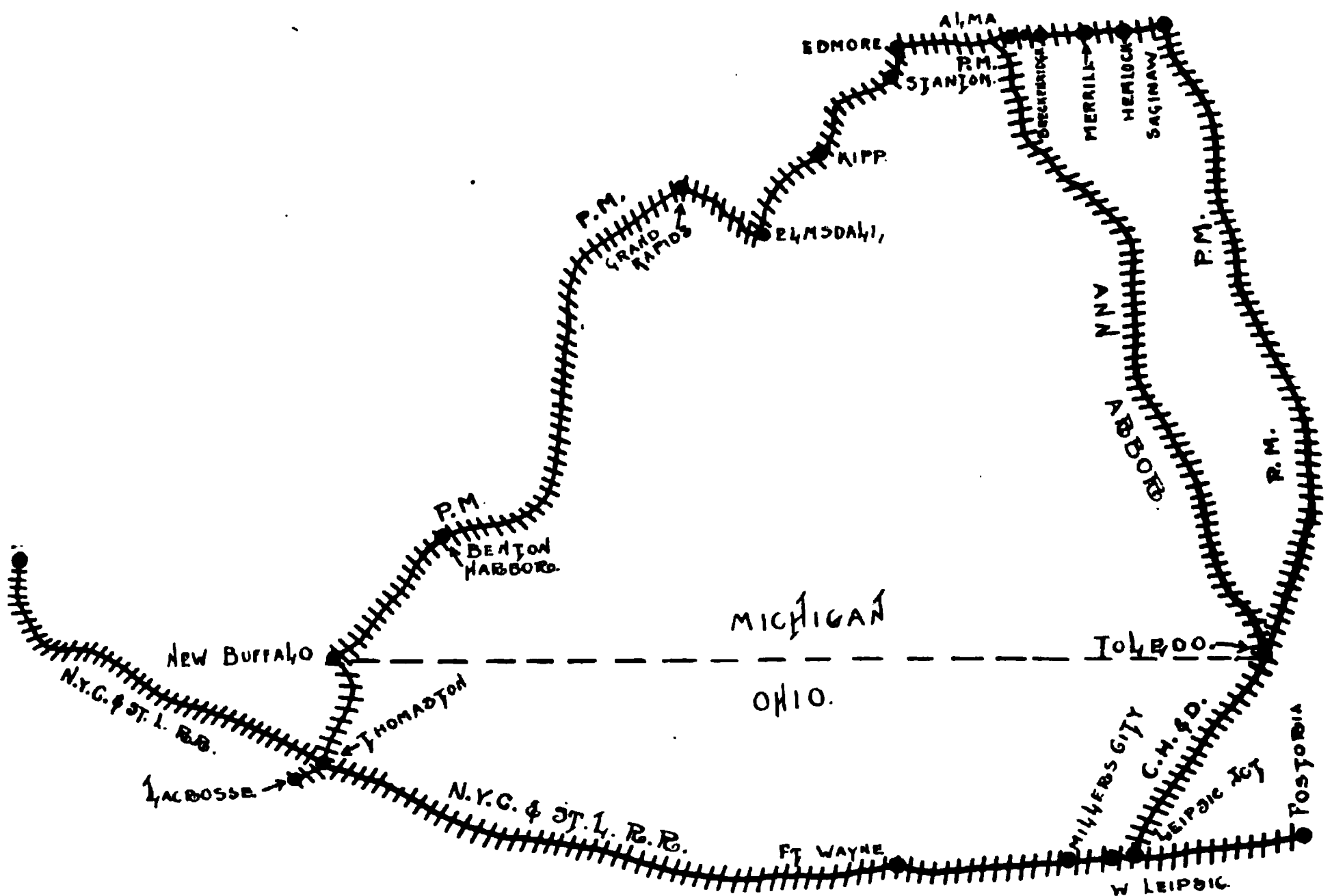
Burket & Burket and Frank B. Carpenter, for plaintiff.
W. S. Snook, contra.

DUNCAN, J.

This suit involves the interpretation of an interstate freight tariff schedule applicable to certain railroads.

During the months of November and December of 1913, the defendant shipped on a through bill of lading ten carloads of drain tile of 30,000 pounds minimum weight from Miller City on plaintiff's line in Ohio, some to Hemlock and others to Merrill on the Pere Marquette in Michigan, both places being between Saginaw and Breckenridge, also on the Pere Marquette in the latter state. The shipments were routed by the defendant and were moved from Miller City over the plaintiff's line east to Leipsic, thence north over the Cincinnati, Hamilton & Dayton to Toledo, thence north on the Pere Marquette to Saginaw, and thence west over the Pere Marquette to Hemlock or Merrill, as happened to be the destination. The shipments might have been routed over the plaintiff's line *west* to Thomaston and

thence in a northeasterly direction over the Pere Marquette through Breckenridge to Merrill or Hemlock, as it happened to be, the same destination. The latter route probably would have been selected by the plaintiff, being the initial carrier, as this would have given it a longer haul. The route over which the shipments moved was probably the shorter. There is not much difference, however. I refer to the map for the location of the several points and the approximate comparative distances.



The Cincinnati, Hamilton & Dayton, the Pere Marquette, and the plaintiff's line, the New York, Chicago & St. Louis, are all parties to the tariff schedules; the rates authorized are joint rates. The rates are joint over either route, and no distinction is made as to who routed the shipments as far as the tariff is concerned. The claim is that the defendant is precluded by his selection of this route from demanding the lesser rate of another route, and there is good authority for the contention. *Barnes on Interstate Transportation*, Sections 188 and 191.

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It is agreed that the rate to Breckenridge by either route over the Pere Marquette is eight cents per hundred pounds, and that the rate to Saginaw by either route is eight and a half cents per hundred pounds. The eight cent rate was paid, but the plaintiff claims that a mistake was made by its agent; that the rate to Hemlock or Merrill over the route the shipments moved was eleven cents per hundred pounds. This suit is brought, therefore, to collect the difference, amounting to the sum of \$101.04. That recovery may be had for an undercharge in such case is well established. *L. & N. Rd. Co. v. Maxwell*, 237 U. S., 94 (59 L. Ed., 853; L. R. A. 1915 E, 665, 8); *K. City S. Rd. Co. v. Carl*, 227 U. S., 639, 653 (57 L. Ed., 683); *B. & M. Rd. Co. v. Hooker*, 233 U. S., 97, 110-113 (58 L. Ed., 868, 875, 876; L. R. A. 1915 B, 450); *Barnes on Interstate Transportation*, Sections 244, 302-03; *G., C. & St. F. Ry. Co. v. Hefley*, 158 U. S., 98 (39 L. Ed., 910); *York Furniture Co. v. Southern Ry. Co.*, 78 S. E., 67. So the question here is to find what was the rate for drain tile shipped in the months of November and December, 1913, from Miller City, Ohio, to Hemelock or Merrill in Michigan, via the New York, Chicago & St. Louis, the Cincinnati, Hamilton & Dayton, and the Pere Marquette.

If I understand the matter, there are two kinds of freight tariffs, a "class" tariff and a "commodities" tariff. A "class" tariff is the tariff generally applicable to all shipments—to all freight and to all points not otherwise provided for. The "commodities" tariff is a tariff provided by the carrier for a certain class of freight to certain points. It is necessary, of course, that both have the approval of the Interstate Commerce Commission, and it is made unlawful for the carrier to depart therefrom on penalty. Even a mistake of the carrier's agent, as we have seen, will not relieve the shipper as against his liability for an undercharge. It therefore follows, unless there is a "commodities" tariff provided for any certain class of freight and to the point in question, that the "class" tariff must apply. That is to say, the "class" tariff applies to every shipment not otherwise specifically provided for.

As to the freight in question, tile drain, there is a "commodities" tariff, over the several railroads, and Miller City is

given as one of the stations *from* which the rates apply. In naming the points *to* which the rates apply, the stations Hemlock and Merrill are not named. On page 4 of the tariff sheet there is a provision for the application of the rates to intermediate points as follows:

“Rates provided in this tariff apply from and to points named only, except that rates from or to intermediate points not named will be the same as shown in tariff from or to the next more distant point from or to which rates are named.”

The “next more distant point * * * to which rates are named” on the route over which these shipments moved, is Breckenridge. Breckenridge, as already stated, has a rate of eight cents per hundred pounds, but we find that there is a mark (2) on the rate sheet next to this rate for Breckenridge, which refers to another provision of this tariff which reads: “Terminal rate only and will not apply to intermediate points.” As these provisions are in this “commodities” tariff, which has been approved by the Interstate Commerce Commission, both must stand as valid provisions, if they can be made to do so, upon any reasonable theory, and as the former is a general provision and the latter a special, the former must yield to the latter as a modification. As it could only be claimed that by the operation of the former provision the “commodities” tariff applied to stations Hemlock and Merrill, that provision being modified by the exception made by the latter provision, we are necessarily driven to the “class” tariff for the rate applicable to these shipments. The “class” rate is eleven cents per hundred pounds, and eight cents per hundred pounds having been paid, it follows that the plaintiff is entitled to recover the difference, making the amount claimed in the petition.

This interpretation most assuredly allows the carrier to charge more for a shorter distance than a longer distance, and if it stood alone, would be in violation of that part of Section 4 of the Interstate Commerce Act, which provides that “it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind

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of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance." It is provided, however, in the latter part of this same section that upon application to the Interstate Commerce Commission "such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act," thus leaving the whole matter within the discretion of the Commission. If this is not so, the provision for the application of the rate for the "next more distant point," would also be invalid and for the same reason.

To show the view taken by the Commission as to its jurisdiction in the premises, Commissioner Harlan in *Poor Grain Co. v. Chicago B. & O. Rd. Co.*, 12 I. C. Rep., 418, 422, 469, says:

"When once lawfully published, a rate, so long as it remains uncanceled, is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of Congress. When regularly published it is no longer the rate imposed by the carrier, but the rate imposed by the law."

See also Drinker on Interstate Commerce Act, Section 240.

It is also held by the Supreme Court of the United States that the Commission alone has power originally to entertain proceedings for the alteration of an established schedule, on the ground that the rates fixed therein are unreasonable and that a shipper who has been compelled to pay such rates has no redress in either the state or federal courts until the Commission, after investigation, has declared the tariff rates unreasonable. *Tex. Pac. Rd. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426 (51 L. Ed., 553); see also *L. & N. Rd. Co. v. Maxwell*, 237 U. S., 94 (59 L. Ed., 853; L. R. A., 1916, E. 665-8); *K. City Rd. Co. v. Carl*, 227 U. S., 639, 653 (57 L. Ed., 683); *B. & M. Rd. Co. v. Hooker*, 233 U. S., 110, 113 (58 L. Ed., 868, 875, 876; L. R. A.,

1915, B. 450); *Gerraty v. Atl. C. L. Rd. Co.*, 211 Fed., 227-8. The opinion in the latter case was written by Justice Day of our own state, in the course of which he says:

“If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission.”

And the Supreme Court of Ohio, in *Swift & Co. v. H. V. Rd. Co.*, 93 O. S., 143, having under consideration the validity of demurrage charges provided in the tariff, approved by the Interstate Commerce Commission, holds:

“Where a demurrage rule, named in the tariff filed by an interstate railroad with the interstate commerce commission and published according to law, has been passed upon and approved by the commission, acting within the scope of its authority, the decision of that tribunal is binding upon the state courts, and the question of the validity of the rule is not open for consideration in an action brought by the railroad company to recover the charges assessed under the rule as to cars engaged in interstate commerce.”

In the course of his opinion, page 151, Judge Newman says:

“Under the provisions of the interstate commerce act, it was the positive duty of the carrier to collect the charges provided for in the tariff, and this is the purpose of the present action. The demurrage rule upon which plaintiff relies relates to interstate commerce. It was passed upon by a federal tribunal having full authority to act and was approved. If the power existed in the courts of the states to question its rulings, it would result, most likely, in diverging opinions and conflicting decisions in matters of interstate commerce, and would be destructive of the uniformity of regulation which the interstate commerce act was designed to secure.”

I think these principles apply here and are conclusive of this case. There will, therefore, be a finding in favor of the plaintiff for \$101.04.

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**WIFE NOT DISQUALIFIED BY DESERTION FROM RECEIVING
WORKMEN'S COMPENSATION.**

Common Pleas Court of Hamilton County.

LENA WARE V. THE INDUSTRIAL COMMISSION OF OHIO ET AL.

Decided, December 1, 1916.

*Workmen's Compensation—Wife Does Not Cease to be a "Dependent"
—By Reason of Having Been Deserted by Her Husband.*

A wife does not cease to be "dependent" upon her husband, within the meaning of the workmen's compensation law, by reason of his failure to support her, and an award will be made in the case of a wife whose husband was killed in the course of his employment after deserting her, without her fault, and taking up with another woman.

Fulford, Shook, Wilby & Fricke, for plaintiff.

Henry G. Hauck, Assistant Prosecuting Attorney, contra.

WARNER, J.

This is an appeal from a decision of the Industrial Commission rejecting the claim of the plaintiff, Lena Ware, upon the ground that at the time of his death she "was not dependent upon the deceased," who was her husband.

The material facts established by the evidence are as follows:

Sam Ware was accidentally killed in Covington, Kentucky, on the 30th day of July, 1915, while in the employ of Platt & Dickinson, of Cincinnati, Ohio, who were subscribers to the state insurance fund. He was a hod-carrier, and a brick fell upon his head and caused his death. He was married to the plaintiff on the 29th day of March, 1899, in Alabama. No children were born of said marriage. About five years before his death he deserted his wife, without her fault, but later returned and lived with her for about one year, and again deserted her about three years before his death, and later married another woman, who had a husband living, and was living with this woman and supporting her at the time of his death. He contributed money and groceries to plaintiff at various times, the last amount being

given her in February, 1915, just before she went to Toledo to see her sick son, who died the following July. Plaintiff was in Toledo when her husband was killed, but at once came to Cincinnati upon being advised of his death. He was seen to give his wife money, after his desertion of her, by various witnesses, but the amount of such payments does not appear. He is reported to have said a few days before his death that he was going to send her some money. During the time of his last desertion he called to see her with some frequency, and at times remained all night. These parties are colored people, and the wife is without any resource except her own work.

Upon these facts the question arises whether or not she was wholly, or in part, dependent upon him for support. I think the provisions of the workmen's compensation act should be construed liberally toward claimants to the end that they shall receive just, reasonable and fair compensation for injuries and losses sustained by reason of the results of accidents that are always in the nature of greater or less afflictions as well as injury and loss.

Whether or not a wife is dependent upon her husband, who has deserted her without just cause, should be determined upon consideration of his legal liability for her support, and his recognition of the same, as well as the other facts and circumstances attending the situation and conduct of the parties. A wife should not be punished for the delinquencies of a recreant husband. This law provides that a wife should be considered wholly dependent upon the husband with whom she is living at the time of his death. Whether the dependency is *in whole*, or *in part*, where they are separated, must be determined by the facts existing at the time of the death. A more righteous law would be one, as in some states, that makes the wife conclusively presumed to be wholly dependent upon a husband, unless possessed of ample means in her own right.

Webster defines a dependent as "one who relies upon another for support." The fact that such reliance is misplaced, or that such other fails in his duty in the premises, would not and should not make a dependent non-dependent. The dependency

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exists whether it is recognized or not by him who owes the duty of support. To say that a wife is not dependent upon her husband because he fails to support her, and she is obliged to appeal to the charity of friends, or to her own efforts, is to permit his unscrupulous conduct to determine the fact, rather than the justice and right of the case.

I think, upon the facts in this case, that the plaintiff was dependent, in part at least, upon the deceased for support, and that he recognized that fact and contributed, not as he ought to have done, but in a degree that was helpful. As to the wages of the deceased, the law provides as follows:

“Section 37. The average weekly wage of the injured person, at the time of the injury, shall be taken as the basis upon which to compute the benefits.”

No provision exists by which the “average weekly wage” may be determined, but some force should be given to the word “average.” It is difficult and sometimes impossible, in the case of common laborers, like the deceased, to ascertain for any considerable length of time the wage paid. It becomes necessary, therefore, to take such data as is found, and, making such assumption as the facts seem to warrant, establish the average wage for such length of time as seems reasonable under the conditions of the case.

A careful estimate and consideration of the available data of the time the deceased worked during the eleven months preceding his death, and he seems to have worked with a good degree of regularity, brings me to the conclusion that his average weekly wage at the time of his death was \$12.80, which entitles the plaintiff to a judgment for \$2,662.40.

I think \$600 is a reasonable counsel fee to plaintiff's attorneys, and that amount may be taxed in the costs. Judgment accordingly.

**ALLOWANCE TO A WIFE DIVORCED ON HER
AGGRESSION.**

Common Pleas Court of Summit County.

ETHEL MCCOLGAN V. PARK A. MCCOLGAN ET AL.

Decided, December 27, 1916.

Husband and Wife—Action by Both for Divorce—Where They Are by Temperament Clearly Unsited to Each Other—Allowance to the Wife Although the Decree is Given to the Husband—Allowance Made a Lien on an Estate in Expectation.

1. A wife who has borne her husband five children and has carried her share of their common burden is entitled to an allowance out of the property of her husband, notwithstanding that her petition for a divorce has been dismissed and a decree has been granted to the husband on his cross-petition.
2. Where the estate of the husband is in the form of an inheritance in remainder, the present value of which is \$6,000, the wife will be awarded one-third of said present value of the estate in expectation, and in addition an allowance for the maintenance of the child left in her custody, with judgment for money, with interest, loaned to him by her and not repaid; and the award so made will be declared a lien on the estate in expectation.
3. Personal property may be divided in gross, and where in the form of household goods and farm implements of equal value, the former may be awarded to the wife and the latter to the husband.

Merle E. Rudy, for plaintiff.

Warren F. Selby and Hagelbarger & Doolittle, contra.

McCLURE, J.

This is an action for divorce brought by plaintiff, the petition alleging gross neglect and extreme cruelty, and the prayer is for divorce, the custody of minor children and an allowance of reasonable alimony.

The defendant has answered denying the allegations of cruelty and neglect and by way of cross-petition asking for a divorce and the custody of the children on the ground of gross neglect

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of duty on the part of the plaintiff. The parties have been married ten years and five children were born of the marriage, three of whom are living. A separation occurred in July of the present year following a long period of domestic trouble. The parties have no property of any consequence in their possession, but the husband is seized of a two-fifths interest by way of remainder in certain real estate which comes to him by will from his father, J. S. McColgan, deceased, consisting of a farm and some city lots, which it is agreed are worth as a whole the sum of \$30,000, the other three-fifths of the property having been devised to a sister of defendant, and the whole being subject to a life use in the widow of J. S. McColgan, deceased, with power to sell for her support if necessary.

The defendant is at present in receipt of an income of \$35 per month under a contract with his mother to work said farm, which expires April 1st, 1917. He testifies that he will be able to earn \$100 per month in other employment.

As to the specific charges of cruelty on the part of the defendant towards the plaintiff, the court finds that they are not supported by the weight of the evidence. The court further finds on the charge of gross neglect made by plaintiff against the defendant that plaintiff was provided with food and clothing suitable to her station in life, and that if there was neglect in procuring medical attendance at the time of the birth of children it was a neglect in which both parties shared and for which defendant is not to be held responsible. It follows that the plaintiff having failed to maintain the allegations of her petition the same is dismissed by the court.

The allegations of gross neglect made by the defendant in his cross-petition are found to be sustained by the weight of the evidence and the defendant is granted a decree of divorce from said plaintiff on the grounds of gross neglect of duty.

The court finds that the interests of the two older children, Mildred and Millard McColgan, will be best subserved by awarding their custody to the father, the defendant, Park A. McColgan, and it is accordingly so ordered. By reason of the infancy of the minor child, Ivan McColgan, his custody is awarded to the

plaintiff and the defendant is ordered to pay to the plaintiff for the support of said Ivan McColgan the sum of \$10 per month until said child shall attain the age of 16 years, or until the further order of the court, commencing January 1, 1917.

While it is apparent to the court under the evidence in this case that there was a manifest failure on the part of the wife to fulfill her marital duties to her husband and children, it was by no means a total failure. She has contributed ten years of service to the common enterprise, has apparently taken her share of the work and has borne the defendant five children. By temperament the parties are clearly unsuited to each other and should not have entered the marriage relation in the first instance.

The evidence discloses that the plaintiff out of a legacy which she received some time in April, 1907, up to about August 1, 1908, advanced to the defendant various small sums from time to time, taking his notes therefor, which amount in the aggregate with the accrued interest to the sum of \$654.54, which it is conceded should be repaid by defendant to plaintiff, and judgment may be entered therefor.

The present worth of the interest of the defendant in the estate of his deceased father is computed at the sum of \$6,000. It is ordered and adjudged by the court that there be set off and decreed to the plaintiff as and for her interest in her said husband's real estate, the sum of \$2,000, and that the same together with the alimony for the support of the minor child and the judgment in her favor upon said notes, be made a charge upon said interest of said defendant in the real estate described in plaintiff's petition, under the last will of J. S. McColgan, deceased.

The personal property may be divided in gross, the household goods to the plaintiff, or such as she may desire, and the farming tools to the defendant. The defendant to pay the costs.

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Columbus v. Spielman et al.

**VALIDITY OF THE LEASE TO PROPERTY HELD BY
A MUNICIPALITY.**

Common Pleas Court of Franklin County.

CITY OF COLUMBUS V. OTTO M. SPIELMAN ET AL.

Decided, December 22, 1916.

*Municipal Corporations—Appropriation of Money in Excess of Revenue
—Not a Matter of Concern to a Creditor of the Municipality, When
—Application of the Burns Law of Rentals Accruing Against a
City—May Lease Property Without Obtaining Approval of the
Board of Control—Section 4403.*

1. That a municipality has appropriated money in excess of its revenues is a matter of no concern to a party dealing with it who receives his money in due course, and such a situation does not afford grounds for refusing relief to a city from the forfeiture of a lease held by it.
2. Moreover, the Burns law has no application to a year's rental appropriated out of the proceeds of a lawful issue of bonds, nor can said law be construed as applying to rental for subsequent years under the same lease.
3. A lease entered into by the proper officers of a municipality for property needed for municipal purposes, is not rendered invalid by reason of the fact that it is a contract involving an expenditure of more than \$500 and was not approved by the board of control.

BIGGER, J.

This action is brought by the city seeking the aid of equity to relieve it from a forfeiture of a lease. I shall not attempt to state at length the averments of the pleadings, but state briefly my conclusion based upon the evidence and the law.

First, the court concludes that if the city of Columbus has a valid contract of lease, upon the evidence and the law, it is entitled to the relief prayed for.

The breach was a technical one and can be compensated by the payment of the amount due with interest.

As to the argument that the breach of the city was willful in that it had through its city council appropriated a large amount

of money beyond its revenues, it is to be said that it is a matter of no concern to the defendants whether the city had exceeded its revenues or not, provided the city obtained the money by borrowing it so as to satisfy the defendants' claim for rent, and this it appears the city has done, but in so doing was in arrears for payment one day beyond the time limited by the lease for payment. The court concludes, therefore, that if the city has a valid lease it should be relieved upon the facts from the forfeiture thereof.

But it is contended that the lease is invalid for two reasons: first, because the Burns law was not complied with; and second, because the board of control did not approve the contract.

As to the first ground of this contention that the city auditor had not certified that the money was in the treasury, I am of the opinion that in the light of the decisions in this state construing the Burns law, it has no application to this contract, because as to the amount of the first year's rent, it was provided for out of a bond issue and was not payable out of the general revenues of the city for the current year. The city having sold the bonds, appropriated out of the proceeds sufficient to pay the amount of the first year's rent. There is no claim that the city was without authority to issue the bonds and make the appropriation of the proceeds. *City of Akron v. Dobson*, 81 O. S., 56.

Furthermore, it is expressly provided by statute—Section 3810—that money to be derived from lawfully authorized bonds or notes sold or in process of delivery shall, for the purposes of the certificate that money for the specific purpose is in the treasury, be deemed in the treasury and in the appropriate fund.

As to the annual rent to accrue in subsequent years under the lease, in the opinion of the court the Burns law is not applicable. The law can not be construed to mean that the entire amount to be paid as rent under a lease running for a term of years shall be collected and hoarded in the treasury until it shall become due.

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Judge Hunt, of Cincinnati, in a case reported in 12 N.P.(N. S.), 633, collects the Ohio cases on the subject decided up to the date of that decision and well states the general exceptions to the applicability of this law on page 635 and in which he says it is not applicable to cases where such expenditures are to be distributed over periods of time, during each of which periods the necessary money is to be raised by the exercise of powers specifically given therefor. It is not a sufficient answer to this construction of the Burns law to say that its wholesome provisions might be avoided by the simple expedient of postponing the maturity of obligations. It is to be assumed that when a case presenting such attempted evasion arises, the provisions of the law will be applied without regard to such attempted evasions. But in the case at bar the statute expressly empowers municipal corporations to execute leases. No time limit is imposed upon the municipal corporations in this respect. In the case at bar the lease is for five years with a right to renew for five years more. There is here plainly no attempted evasion of the provisions of the Burns law and it seems clear to the court that the Burns law has no application to such a case.

The court realizes that the decisions are not altogether harmonious, but it is the duty of the court to decide it in the absence of a controlling decision upon the exact question in point in accordance with what is considered to be the better reasoning.

But it is said by counsel for the defendants that Section 3809 engrafted upon the Burns law certain exemptions from the operation of that law and that a lease by the city for a term of years is not one of them, and that upon the doctrine of *expressio unius exclusio alterius*, the court has no right to extend the exemptions therein specified. Counsel says that the Legislature could just as well have exempted a lease such as this, as to have exempted from its operations a contract with an electric light company. That overlooks, however, the fact that at the time of the enactment of this act exempting certain kinds of contracts, the provisions of the statute which confers the right upon municipalities to execute leases for land needed for any municipal pur-

pose, was not in existence. The section containing these exemptions provided that the city might lease an electric light plant and then proceeded to exempt such a lease from the operation of the Burns law. It could not have included such a lease as this for the reason that the city was not then empowered to enter into such a lease.

- Upon the subject of the application of this doctrine of *expressio unius exclusio alterius*, it is stated by the writer of the article on statutes in 26 Am. & E. Enc. of Law that:

“Where there is some necessity for mentioning a particular thing, and none for mentioning another thing, to require the mentioning of the former as intended to exclude the latter, would be an exceedingly unnatural and unreasonable rule of interpretation.”

Applying this principle to the case in hand when these exemptions were engrafted upon the Burns law, there was necessity for exempting leases of electric light plants for the reason that the section itself authorized such a lease. But the fact that a thing does not exist is a sufficient reason for not mentioning it, and the general power to lease land for municipal purposes did not then exist. But the very fact that the lease which was then authorized was exempted, shows the legislative purpose with respect to contracts of a similar character in so far as the application of the Burns law is concerned, and is an expression of the view of the Legislature that such are not intended to be embraced within the terms of the Burns law.

The second objection to the validity of the lease is that the contract was not approved by the board of control. Section 4403 of the civil code provides that:

“No contract in the department of public service or the department of public safety in excess of \$500 shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into it.”

Section 4371 provides that:

“The director of public safety may make all contracts and expenditures of money for acquiring lands for the erection and

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repair of station houses, police stations, fire department buildings, fire systems, and plugs that may be required and for the purchase of engines, apparatus and all other supplies necessary for the police and fire departments and for other undertakings and departments under his supervision, but no obligation involving the expenditure of more than five hundred dollars shall be created unless first authorized and directed by ordinance of council."

These two sections of the municipal code were originally parts of the same act, Section 4371 being Section 154 of the act and Section 4403 being Section 154a of the same act. 99 O. L., 564-565.

It would seem from a cursory reading of these two sections that the Legislature had here provided a situation which would lead to a conflict of authority between the city council and the board of control. The director of public safety is here forbidden seemingly to make any contract involving an expenditure in excess of \$500, unless it be first authorized and directed by both the city council and the board of control. In case one of the two bodies should direct the director of public safety to enter into a certain contract, while the other refuses to authorize and direct it, which is to control the director in the exercise of his official functions? In my opinion, when these two sections are properly construed no conflict of authority can arise between the council and the board of control. Section 4403 is intended as a check upon the exercise of the powers of contract conferred upon the director of public safety only and was not intended as a check upon the action of the council in the exercise of the powers conferred upon it to authorize and direct the making of contracts by the director. In the great majority of cases the authority and direction of council for the making of a contract in the department of public safety is not special and particular, but general. The great majority of cases of contracts entered into by the director of public safety are contracts which are to be awarded to the lowest and best bidder, in which case the authority and direction of the city council contains no direction that the director shall contract with any particular individual or

upon any specific terms. When it comes to a contract such as is here in question, however, the principle of competitive bidding can not be applied. The city desires to obtain a particular piece of property, which by reason of its location or suitability in other respects it is especially desirable that the city shall obtain and the contract can be made only with the owner of it. In such case the director seeks authority and direction from the city council to enter into that specific contract and the city council authorizes and directs that specific contract to be entered into. In such case, in the opinion of the court, it could not have been the legislative intention that the board of control should exercise what in effect would be the veto power, which the statute gives to the mayor of the city. When only general authority and direction to the director of public safety is given by ordinance of the council, as for the purchase of materials and equipment, or for the erection of needful structures for the department, and he is called upon to exercise his judgment and discretion as to the particular individual with whom he shall contract and the terms upon which the contract shall be let, then as a check upon the exercise of that discretion, before he can award such a contract he must obtain the approval of the board of control. Thus construing these sections, it is apparent that no conflict of authority can arise between the city council and the board of control; and in the opinion of the court this was the legislative purpose and intention and that the provision of the statute which requires the approval of the board of control is a provision intended as a check upon the exercise of the discretion reposed in the director, and that when he has no discretion the reason for such provisions fails and therefore the provision for such approval does not apply.

I conclude, therefore, that the contract of lease is a valid and enforceable one and that the city is entitled to the relief prayed for and an entry may be drawn to that effect.

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DAMAGES UNDER THE VALENTINE ANTI-TRUST LAW.

Common Pleas Court of Hamilton County.

**THE HENRY GILDEHAUS COMPANY V. THE BUSSE & BORGMAN
COMPANY ET AL.**

Decided, November, 1916.

*Valentine Anti-Trust Law—Undertakers' Protective Association
Charged with Libeling an Outside Concern—Members of the As-
sociation Not Answerable Under the Anti-Trust Law, When.*

1. Under the provisions of the Valentine anti-trust law damages can be recovered for only such acts as are expressly forbidden by that act, and the provisions of that act should not be given a wider scope than its terms fairly import.
2. But a combination of persons formed for the purpose of boycotting those who refuse to become members of their organization and the further combining of such organization with a labor union in furtherance of said boycott, whereby an attempt is made to prevent the public from dealing with said non-members on account of their alleged unfairness toward union labor, is a combination to create or carry out restrictions in trade or commerce within the meaning of the Valentine anti-trust law.

*Dempsey & Nieberding and Dinsmore & Shohl, for the motion.
Sherman T. McPherson, contra.*

GEOGHEGAN, J.

Heard on motion to strike from the petition.

The averments contained in the petition designated in the motion by the numbers 1, 2, 3, 4, 5 and 6, will be stricken out. An examination of the petition discloses that these allegations are simply statements of what is contained in the by-laws of what is described as "The Undertakers' Protective Association of Cincinnati," etc. They seem to be unnecessary and immaterial to the cause of action set forth in the petition, and if they have any place in this lawsuit it can only be as matters of evidence.

As to the averment designated in the motion as number 7, I have come to the conclusion that that may properly remain in the petition inasmuch as it contains the alleged covenant whereby the members of the association fix the prices for their conveyances and provide a punishment for the infraction of the rule laid down in Section 26. While, of course, it would not have been necessary to set out this provision verbatim, nevertheless, in the light of all the circumstances pleaded and the nature of the cause of action set forth in the petition, I am of the opinion that it should be permitted to remain in the pleading just as it is.

As to the averment designated under number 8 in the motion, I think the motion is well taken. I do not think that the fact that the plaintiff was compelled to buy an auto hearse by reason of the refusal of the defendant to provide him with one is a proper element of damage in a cause of action of this kind brought under a special statute. It may be presumed that plaintiff still has the hearse and it is worth as much as plaintiff paid for it. Therefore, no damage could have been sustained.

As to the averment designated as number 9 in the motion, the question involved has not been without difficulty. That averment is as follows:

“That the defendant circulated and caused to be circulated in Cincinnati, Hamilton County, Ohio, in furtherance of said agreement and conspiracy above set forth, that plaintiff was unfair to union labor, knowing the same to be untrue, to the great damage and injury of its business.”

This action is one brought to recover the penalty provided for in Section 6397, General Code, which is a part of that act which is commonly known as the Valentine anti-trust law. Inasmuch as the action is brought under that act, it would seem that damages can only be recovered for the doing of those things that are expressly prohibited by the act.

I have made a careful examination of all the provisions of the act and nowhere do I find therein that a conspiracy entered into between two or more persons for the purpose of boycotting another in his business by circulating that he is unfair to union

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labor is prohibited by the act. While it is true that as a matter of law such a conspiracy may be made the subject of an action for damages by him who has been injured thereby, nevertheless, in a special action authorized by statute such as the one under review here, it would seem that the provisions of the act should not be given a wider scope than its terms fairly import, nor should damages be given for injuries that are not expressly provided for in the statute, and this is especially true where the damages fixed by the statute are not only compensatory but are exemplary in their nature as in this case where the statute allows twofold the damages sustained by the one injured.

Therefore, I am of the opinion that the averment designated in the motion as number 9 should be stricken out.

I will make the same ruling as to the averment designated as number 10 in the motion. That allegation is as follows:

“Plaintiff further says that the defendants are an unlawful trust and combination of capital, skill, and acts, to accomplish the unlawful purpose aforesaid.”

This averment is purely epithetical in its nature and does not add anything to what has already been said. When a party has pleaded the facts upon which his cause of action is based, it does not add anything to that cause of action to characterize the acts of the defendants as unlawful, wrongful, illegal, etc., and, therefore, inasmuch as under this ruling the petition will have to be amended, this allegation will be stricken from this petition as being unnecessary and immaterial. If this were the only ground of the motion, the court would not be inclined to compel an amendment of the petition, but in the interest of accurate pleading does so inasmuch as an amendment must be made.

Leave will be given to file an amended petition.

ON REHEARING.

GEOGHEGAN, J.

This matter came on again for a rehearing of the court's ruling striking from the petition herein the averment reading as follows:

“That the defendants circulated and caused to be circulated in Cincinnati, Hamilton county, Ohio, in furtherance of said agreement and conspiracy above set forth that plaintiff was unfair to union labor, knowing the same to be untrue, to the great damage and injury of its business.”

The court, at the time of ruling upon said motion, expressed the opinion that the act known in Ohio as the Valentine Anti-Trust Law, Section 6390, *et seq.*, General Code, did not by its terms expressly prohibit the doing of the act complained of in the allegation above set forth, and that as this action was brought to recover the penalty provided for in said act, only such things might be pleaded as were expressly prohibited by said act. At that time the court's attention had not been directed to the various cases decided by the Supreme Court of the United States in which the Sherman Anti-Trust Law was discussed and construed, especially the case of *Loewe v. Lawlor*, 208 U. S., 275, wherein the Supreme Court of the United States held as follows:

“A combination of labor organizations and the members thereof, to compel a manufacturer whose goods are almost entirely sold in other states, to unionize his shops and on his refusal so to do to boycott his goods and prevent their sale in states other than his own until such time as the resulting damage forces him to comply with their demands, is, under the conditions of this case, a combination in restraint of interstate trade or commerce within the meaning of the Anti-Trust Act of July 2, 1890, and the manufacturer may maintain an action for threefold damages under Section 7 of that act.”

Now, the only theory upon which the combination of labor organizations was held to be a combination within the purview of the Sherman Anti-Trust Act was that it was a combination in restraint of interstate trade or interstate commerce.

Section 6391 of the General Code of Ohio provides as follows:

“A trust is a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations or associations of persons for any or all of the following purposes:

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“1. To create or carry out restrictions in trade or commerce. * * *”

It seems, therefore, that by a parity of reasoning a combination of persons for the purpose of boycotting a person who will not become a member of their organization and a further combination by these persons with a union labor organization in furtherance of this boycott, whereby an attempt is made to have persons refuse to deal with him on account of an alleged unfairness to union labor, is a combination to create or carry out restrictions in trade or commerce within the view of this act.

Therefore, I have reconsidered my opinion heretofore rendered and now hold that in so far as the matter above sought to be stricken out is concerned the motion should be overruled.

An order will therefore be prepared in conformity with this ruling and the ruling heretofore made is modified by this ruling.

**CONCURRENCE OF ALL TWELVE JURORS NECESSARY
IN AN APPROPRIATION CASE.**

Probate Court of Pike County.

NORFOLK & WESTERN RAILWAY COMPANY v.
RACHEL M. FOSTER ET AL.

Decided, November 20, 1916.

*Jury—Provision for Return of Verdict by Three-Fourths of Jury—
Not Applicable in Appropriation Proceedings—Action to Appropri-
ate Not a Civil Action—Section 11455.*

A proceeding for appropriation of property is a special proceeding, and not a civil action within the meaning of Section 11455, as amended, providing for return of a verdict upon concurrence of three-fourths of the jury therein.

Bannon & Bannon and Levi Moore, for plaintiff.

J. D. Withgott and G. W. Rittenour, for Rachel M. Foster.

BARCH, J.

Heard on motion for a new trial.

The defendant, Rachel M. Foster, has filed herein a motion to set aside and vacate the verdict of the jury, and for a new trial in said cause on account of certain alleged errors that occurred during the progress of the trial.

Ten reasons are set forth in said motion, but the court does not deem nine of them of sufficient importance to give them any consideration, but will confine itself to the fifth in number, which is as follows:

“The court erred in instructing the jury that it could bring in a verdict by three-fourths of the jury concurring.”

Arguments for and against the motion have been presented by counsel and the matter is before the court.

Section 11212 of the General Code says:

“The provision of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title.”

The amendment to the Constitution, Article I, Section 5, provides that:

“The right of trial by jury shall be inviolate, except that, in *civil* cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.”

The Legislature, in 1913, acting under said amendment, saw fit to amend Sections 11455, 11456 and 11457 of the General Code relative to verdicts in common pleas court and passed the following:

Section 11455. “In all *civil actions* a jury shall render a verdict upon the concurrence of three-fourths or more of their number. The verdict shall be in writing and signed by each of

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such jurors concurring therein, and they must then be conducted into court, where their names shall be called by the clerk, and the verdict handed to the clerk by the foreman. The clerk must then read the verdict to the jury and make inquiry if it is the verdict of three-fourths or more of their number.”

There are two forms of action, known as civil and criminal, and we are certain that the case at bar is not criminal, so we are led to ask, “is a condemnation proceeding, or in other words, is a proceeding for the appropriation of land a *civil* action?”

We find in the 9th Ohio Circuit Court Reports (New Series), page 114, in the case of *Nypano Railway Company v. Wadsworth Salt Co.*, the Circuit Court of Medina County, in which Judges Winch, Marvin and Henry sat, in rendering their decision, make the following statement:

“This conclusion is reached by a majority of the court only, by construing the word ‘evidence’ as used in Section 6429, Revised Statutes, to mean ‘testimony.’

“Judge Henry is of the opinion that the view can not be used by the jury as evidence, while the majority is of the opinion that the proceedings for appropriation of land are *special* proceedings and not a *civil* action, and that the jury, as assessors, are entitled to take into consideration what they may have learned on the view in arriving at the damages they may assess.”

In the 72d Ohio State, in the case of *Pittsburgh, Cleveland & Toledo Railroad Company v. Tod*, we find the following:

“Section 6411, Revised Statutes, provides that ‘The provisions of law governing *civil* proceedings in the court of common pleas shall, so far as applicable, govern like proceedings in the probate court,’ when there is no provision on the subject in the title relating to procedure in the probate court.

“Section 5305, Revised Statutes, defines new trial: ‘A new trial is a re-examination in the same court, of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision of the court.’ An appropriation proceeding is not a *civil* action, but a special proceeding.”

Now if an appropriation proceeding is not a *civil action*, but a *special* proceeding, and the three-fourths jury law does not

apply, how shall we distinguish between the two, and why is it a special proceeding? Let us again recite the law. Section 11212, General Code:

“The provisions of law governing *civil* proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title.”

The question now arises in our mind, “is there a provision of the law governing appropriation proceedings in the probate court that distinguishes such proceedings from civil actions?”

In Volume 3 of the General Code, Chapter 5, under the heading of Appropriation of Property, we find the following:

Section 11038. “Appropriation of private property by corporations must be made according to the provisions of this chapter.”

Section 11039 provides when appropriation can be made.

Section 11040 refers to the appropriation of the property of a minor, idiot, insane person or imbecile, etc. The next section provides for notices to ward, etc.

Section 11042 says: “In such a case the corporation may file a petition with the probate judge, verified as in *civil* action,” etc.

Section 11044. “Upon the filing of a praecipe therefor, the probate judge shall issue summons for the owners, and persons named in the petition as residents of the state, having an interest, which may be directed to the sheriff of any county, and shall command him to notify the persons it names of the filing of the petition, and to appear thereto at a time to be fixed by the judge, and therein stated, not less than five nor more than fifteen days from the date thereof. It must be served and returned as in a *civil* action.”

Is there anything in this section peculiar to serving a summons in civil actions in the court of common pleas?

Section 11047 provides that the probate judge shall issue an order to the clerk and sheriff to draw sixteen names from the

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jury wheel, and further provides for the summoning the jury at a fixed time, not exceeding ten days from the date thereof.

Section 11048 provides that bills of exceptions shall be allowed as in *civil* cases.

Section 11051 provides for the impanneling of the jury and says:

“If the list of sixteen be exhausted before a proper jury of *twelve* men is taken and accepted therefrom, the judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of *twelve* with talesmen, who shall be interrogated as above provided.”

Section 11052. “When a jury box is filled with *twelve* disinterested jurors, the owners of the property which is the subject of the trial shall have the right to four peremptory challenges,” etc.

Section 11053 defines the oath and says in part:

“*You*, and *each* of you, do solemnly swear that, according to your best judgment, you will justly and impartially assess the amount of compensation due to the proper owners in the case which will be brought before you in this proceeding,” etc.

In the case at bar, the verdict was not that of a full jury, only ten concurring, and therefore was not in compliance to the oath as administered by the court.

Counsel for the plaintiff in this case has argued that “the provisions of the law governing civil proceedings in the court of common pleas, shall govern like proceedings in the probate court,” but the same statute adds, “when there is no provision on the subject in the title relating to procedure in the probate court.”

There are provisions on the subject relating to appropriation of private property as found in the General Code.

This court is led to believe that, in light of the sections quoted from the General Code, that an appropriation proceeding is a special proceeding and not a civil action as referred to in Section

11455, as amended, relative to the three-fourths verdict of a jury in common pleas court, and that such a verdict does not apply in condemnation proceedings.

We arrive at our conclusions, not only from the Supreme and circuit court decisions relative to *civil* actions and special proceedings as quoted above, but more particularly from the sections of the General Code under the head of "Appropriation of Property."

We find further that none of these sections have been amended or repealed. The first section under this chapter says appropriation of private property by corporations must be made according to the provisions of this chapter, and each succeeding step in the case on up to the impanneling the jury of twelve men and the administration of the oath leads us to believe that the proceeding is special and not a civil action. In the absence of a Supreme Court ruling on the three-fourths jury law, as stated above, we have largely relied on the statutes governing appropriation proceedings in arriving at our conclusions.

The motion to set aside the verdict of the jury and for a new trial is sustained.

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**ADMINISTRATOR BARRED FROM SALE OF LAND TO PAY
CONCEALED INDEBTEDNESS TO AN HEIR.**

Probate Court of Washington County.

JOHN H. RILEY, ADMINISTRATOR OF JAMES STEEN, v.
JOHN H. ARNOLD ET AL.

Decided, December, 1916.

Estates of Decedents—Heir Conceals Indebtedness to Him and Participates in Partition of Land of the Decedent—Then Proves His Claim and Administrator Files Suit to Sell the Same Land in Satisfaction Thereof.

In an action brought by an administrator to sell land for payment of an indebtedness to one of the heirs, the defense lies that the said land was sold to the present holders in an action in partition within one year of the death of the decedent and that the heir, now asserting a claim, concealed said indebtedness and became a party to the partition proceeding and shared in the proceeds from the sale, his disclosure of the claim and proof thereof before the administrator occurring subsequent thereto.

*C. H. Danford, N. E. Kidd and W. E. Sykes, for plaintiff.
Strecker & Williamson, contra.*

SMITH, J.

This is an action by an administrator to subject the lands of a decedent to the payment of his debts.

On the face of the petition it is an ordinary case under Section 10774 *et seq.* of the General Code, which makes it the duty of the administrator, as soon as he finds that the personal property is insufficient to pay the debts of the decedent and the costs of administration, to bring his action either in the proper probate court or court of common pleas to subject any real estate he may have left for that purpose.

The petition alleges that the plaintiff is the duly appointed and qualified administrator of the estate of James Steen, late of Washington county, deceased, and that the debts due from the

deceased is about \$5,000, as near as can be ascertained, among which indebtedness is a judgment in favor of John W. Steen, son and one of the heirs at law of James Steen, for \$4,000, constituting by far the largest part of said indebtedness, and that the charges of administration will be about \$500, making in all total charges of about \$5,500.

The petition further alleges that the total value of decedent's personal property applicable to the payment of his debts is but \$2,154.26, being wholly insufficient to pay the debts and costs aforesaid; that the decedent left about 132 acres of land, more or less, in Warren township, Washington county, Ohio, which is described, and asking that it be sold to apply upon the debts and costs aforesaid.

To this petition John H. Arnold, Raymond A. Arnold, John W. Steen and Henry Arnold were made parties defendant and were duly served by summons, and afterwards by motion of plaintiff Eliza J. Bragg and Rowena Duffy were made parties defendant and were served by publication.

The defendants John W. Steen, Eliza J. Bragg and Rowena Duffy are children of the deceased, James Steen, and his sole heirs at law and were entitled to the next state of inheritance in his real estate. The defendants, John H. Arnold and Raymond A. Arnold, are purchasers under a partition suit in the court of common pleas of this county and the defendant, Henry Arnold, is mortgagee under said John H. Arnold and Raymond A. Arnold.

A further statement of facts is necessary to a complete understanding of the case as under the answers of John H. Arnold and Raymond A. Arnold, purchasers at the partition sale, and Henry Arnold, mortgagee, Sections 10818 and 10819 of the General Code are also brought into the case, as Section 10818 requires the administrator after the institution of proceedings for partition to make a written statement to the probate court of the funds necessary to pay the indebtedness. And the probate court shall ascertain the amount necessary in addition to the personal assets and give a certificate thereof to the administrator, and Section 10819 requires the administrator to present this to the

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court in which the partition suit is or has been pending, and said court shall order the amount necessary to pay the indebtedness to be paid to the administrator out of the proceeds of the sale.

There is a further provision to said Section 10819 which provides that nothing therein contained shall prohibit the executor or administrator from proceeding to sell the land, although it may have been sold on partition or otherwise and the funds fully distributed.

Section 12028, General Code, also provides that no partition shall be ordered within one year of the death of an inhabitant of this state, unless it be alleged and proved that all debts and claims against the estate had been paid or secured to be paid or that the personal property of the deceased is sufficient to pay them.

To the petition of plaintiff, John H. and Raymond A. Arnold, by their answer and cross-petition, set out the partition suit; that the petition therein alleges that the personal property of deceased was sufficient to pay his debts and costs of administering his estate, etc.; that all the heirs of James Steen were duly made parties defendant and that the court of common pleas found the petition to be true and ordered a writ of partition of said premises, and that such proceedings were duly had under the order of said court that the premises were sold to these answering defendants for the sum of \$3,050 and were paid for by them, and that by the order of said court they received a deed for the same from the sheriff of said county and entered upon said premises and made lasting and valuable improvements upon said premises and paid the taxes thereon; that the proceeds arising from said sale were, after the payment of costs, divided among the heirs of said James Steen, the said defendant John W. Steen receiving as his share of the net proceeds thereof the sum of \$953.37, and each of the other heirs a like amount.

There are further allegations that the personal property of decedent was ample to pay all his debts and expenses of administering his estate, except the judgment of the said John W. Steen, and that it is not necessary to sell the same; that John Steen is and should be estopped from asserting any claim against

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said real estate in the hands of these defendants; that they relied upon and acted upon the judgments and decrees in the partition suit above set forth and were induced thereby and by the actions and admissions of said John W. Steen to purchase said real estate, and asking that the title be quieted, etc.

The answer and cross-petition of Henry Arnold, after making the allegations of the answer and cross-petition of John H. and Raymond A. Arnold a part thereof, sets up a mortgage for \$2,300, and asks that it be declared a first lien upon the said property.

To each of these answers and cross-petitions the plaintiff John H. Riley, as administrator of James Steen, and John W. Steen for himself as defendant, have filed demurrers.

The records show that James Steen died intestate on the 8th day of January, 1913. On the 5th day of March, 1913, less than two months after the death of her father, Eliza J. Bragg filed her suit in partition in the Court of Common Pleas of Washington County, alleging that she, Rowena Duffy and John W. Steen were the sole heirs of James Steen and each entitled to one-third of his estate and asking partition of his real estate hereinbefore referred to, and being the same real estate described in plaintiff's petition in this suit and also alleging that the personal property of said decedent was sufficient to pay all debts and costs of administering his estate.

John W. Steen was duly served with summons in said partition case on the 7th day of March, 1913, and the other defendants entered their voluntary appearance to said action. All the defendants were in default for answer and demurrer to the petition.

On July 28, 1913, a judgment and decree was entered in said partition case finding all and singular the allegations of the petition to be true, that Eliza J. Bragg, Rowena Duffy and John W. Steen were tenants in common in said premises and each entitled to one-third part thereof.

Under said judgment and decree a writ of partition was issued and such proceedings had that on the 27th day of September, 1913, the sheriff of Washington county sold said real estate

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to John H. and Raymond A. Arnold, defendants to the petition herein, for \$3,050, and on the 29th day of September, 1913, said court of common pleas duly approved and confirmed said proceedings and ordered the sheriff to convey said premises to said answering defendants herein, and said sheriff did convey said premises to said answering defendants and received the purchase price of \$3,050 therefor, and delivered to the purchasers the deed for said premises, and these answering defendants then took possession of said premises.

On November 7, 1913, the net proceeds of said sale was by said sheriff under an order therefor issued distributed among the said heirs, the said John W. Steen receiving his share amounting to \$953.37, each of the others receiving the same amount, in all \$2,860.11, and the shares of all excepting John W. Steen have been removed from the jurisdiction of said court of common pleas, to-wit, to the state of California, where the said other heirs reside.

It does not appear when the claim of John W. Steen was presented to the administrator of James Steen, but in the absence of any statement or proof to the contrary the presumption is that, if it had been presented prior to the distribution of the funds under the partition suit, the administrator would have taken the necessary steps to hold up said funds until after the claim had been determined.

Suit was not brought in the court of common pleas against said administrator upon the claim of John W. Steen until December 20, 1913.

It is unnecessary at present to go into this case further than to determine whether the several demurrers to the answers and cross-petitions of John H. and Raymond A. Arnold and of Henry Arnold should be overruled or sustained.

Several principles seem to come into direct conflict in this case.

There is no question that under many circumstances the administrator of an estate has the right and it would be his duty to proceed to sell the real estate of a decedent for the purpose of paying his debts, notwithstanding the fact that the lands might

said real estate in the hands of these defendants; that they relied upon and acted upon the judgments and decrees in the partition suit above set forth and were induced thereby and by the actions and admissions of said John W. Steen to purchase said real estate, and asking that the title be quieted, etc.

The answer and cross-petition of Henry Arnold, after making the allegations of the answer and cross-petition of John H. and Raymond A. Arnold a part thereof, sets up a mortgage for \$2,300, and asks that it be declared a first lien upon the said property.

To each of these answers and cross-petitions the plaintiff John H. Riley, as administrator of James Steen, and John W. Steen for himself as defendant, have filed demurrers.

The records show that James Steen died intestate on the 8th day of January, 1913. On the 5th day of March, 1913, less than two months after the death of her father, Eliza J. Bragg filed her suit in partition in the Court of Common Pleas of Washington County, alleging that she, Rowena Duffy and John W. Steen were the sole heirs of James Steen and each entitled to one-third of his estate and asking partition of his real estate hereinbefore referred to, and being the same real estate described in plaintiff's petition in this suit and also alleging that the personal property of said decedent was sufficient to pay all debts and costs of administering his estate.

John W. Steen was duly served with summons in said partition case on the 7th day of March, 1913, and the other defendants entered their voluntary appearance to said action. All the defendants were in default for answer and demurrer to the petition.

On July 28, 1913, a judgment and decree was entered in said partition case finding all and singular the allegations of the petition to be true, that Eliza J. Bragg, Rowena Duffy and John W. Steen were tenants in common in said premises and each entitled to one-third part thereof.

Under said judgment and decree a writ of partition was issued and such proceedings had that on the 27th day of September, 1913, the sheriff of Washington county sold said real estate

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On November 7, 1913, the net proceeds of said sale was by said sheriff under an order therefor issued distributed among the said heirs, the said John W. Steen receiving his share amounting to \$953.37, each of the others receiving the same amount, in all \$2,860.11, and the shares of all excepting John W. Steen have been removed from the jurisdiction of said court of common pleas, to-wit, to the state of California, where the said other heirs reside.

It does not appear when the claim of John W. Steen was presented to the administrator of James Steen, but in the absence of any statement or proof to the contrary the presumption is that, if it had been presented prior to the distribution of the funds under the partition suit, the administrator would have taken the necessary steps to hold up said funds until after the claim had been determined.

Suit was not brought in the court of common pleas against said administrator upon the claim of John W. Steen until December 20, 1913.

It is unnecessary at present to go into this case further than to determine whether the several demurrers to the answers and cross-petitions of John H. and Raymond A. Arnold and of Henry Arnold should be overruled or sustained.

Several principles seem to come into direct conflict in this case.

There is no question that under many circumstances the administrator of an estate has the right and it would be his duty to proceed to sell the real estate of a decedent for the purpose of paying his debts, notwithstanding the fact that the lands might

have been partitioned among the heirs or otherwise disposed of. Section 10819, General Code, just hereinbefore quoted, so specifically provides.

The same doctrine is stated in many cases by our own courts.

Faran, Administrator, v. Robinson et al, 17 O. S., 243, is a case where the administrator had, as he supposed, finally settled the estate and partition of it had been made, but he was sued upon a claim, and after defense made thereto, judgment was rendered against him, and upon this judgment he brought an action to sell the real estate theretofore partitioned. After said supposed final settlement was examined and allowed and the court in deciding this case, referring to the judgment upon which the action was brought, says:

“Whether error did or did not intervene in the rendition of that judgment is not a question of which in this proceeding we can take cognizance. In this collateral proceeding it is conclusive evidence of the indebtedness adjudged by it, unless impeached for fraud or mistake in obtaining it, or perhaps the culpable negligence of the plaintiff in the defense of the action in which it was obtained, and no fraud or mistake recognized in law as such is here claimed to have existed in the obtaining of the judgment against the plaintiff in this case, nor is there any allegation of such negligence.”

Again the court says:

“The fact that the real estate of the plaintiff's intestate has been partitioned among his heirs and by them conveyed with or without notice to third parties now claiming title in or through them makes no difference.

“Under our laws the real estate of a deceased person, subject to the widow's right of dower, is in the last resort as much and as truly assets in the hands of his personal representative for the payment of his debts as his personal property is. His debts are a lien upon his real estate; his heirs to whom it descends take it *cum onere*; and whoever buys it from them does so subject to the rule of *caveat emptor*. For their indemnity, if any, in case their lands are sold out from under them, they must look to such guaranties or warranties as they may have had the precaution to insist on, or to such rights as they may have to compensation or redistribution from their co-partitioners.”

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In the case of *Doan et al v. Biteley*, 49 O. S., 589, the court says:

“While upon the death of the ancestor his real property passes to the heir at law or to the devisee in accordance with the provision of the will, it does so charged with the payment of his debts if it becomes necessary to resort to it for that purpose. The debts are a lien upon the land and the heirs take it *cum onere*.”

In *Myers v. Myers* (Circuit Court of Crawford County), 9th Ohio Circuit Reports (New Series), page 449, the same doctrine is fully laid down, and the Supreme Court has repeatedly held that the debts of the ancestor are a lien on his lands indefeasible by any action of the heirs or others in a partition case, and that any purchaser thereof, either by private purchase from the heirs or at a partition sale, takes the land *cum onere*.

“And under the statutes and decisions previously referred to no order of partition could avail to prevent the sale of the lands on his demand, the necessity of a sale to pay debts being undisputed, nor could the partition, had one actually been made, and even though the lands had been resold to third parties have prevented a sale of the same lands at his demand. No title could have passed by an order of partition that would have been free from the claim of the administrator for debts of the estate.”

In the case of *Stout v. Stout et al*, 82 O. S., 358, the same doctrine is laid down strongly, and the court uses this language:

“In other words, if there were no debts in excess of the personalty to be paid, the administrator could not possibly have any interest in the land, while if there were such debts the partition suit commenced the day after the decease of the intestate was simply an impertinence.”

This case and that of *Myers v. Myers* above cited seem to question the right to or validity of any order or writ of partition issued prior to one year after the death of the decedent under any circumstances whatsoever. No court, at least, should issue said order unless bond be given as provided by Section 12028 of the General Code, for it would be next to impossible to ascertain with any certainty that the debts were all paid,

since creditors have one year from the date of notice of appointment in which to present their claims, and it is very loose practice at least to authorize the issuing of a writ prior to the expiration of one year in pursuance of the statute.

Is there anything in the case in hand to take it out of the general rule?

The facts have heretofore been stated and we have only to look at the claims made by the purchasers at the partition sale to see whether in equity John W. Steen would have the right to have the premises resold by the administrator for the purpose of paying his claim, or is he estopped by his action in the partition suit.

The petition of the plaintiff administrator on the face of it shows that the great bulk of the indebtedness arises from the judgment of said John W. Steen, who was a necessary party to the partition suit. Taking the statement of the administrator set out in his petition we find that the personal property of the estate amounted to \$2,154.26, and that the indebtedness of the estate and estimated cost of administration, aside from the judgment of John W. Steen, would be but \$1,000, leaving \$1,154.26 applicable to the payment of claim of John W. Steen without selling the land. This, with the \$953.37 received from the sale in the partition suit would make him \$2,107.63.

The amount received by him, of course, is immaterial so far as a resale by the administrator is concerned unless he, Steen, be estopped.

It is claimed by plaintiff's attorney that the case of *Fisher's Executor v. Mossman et al*, 11 O. S., 44, applies, but it seems to us that it does not in any way. It was a mortgage lien duly recorded, open to all the world and notice to every one dealing with the premises. Herein John W. Steen was the owner of an undivided one-third interest in the land in question. It could be taken from him, without some action of his own, only if it became necessary to sell it to pay the debts of the ancestor from whom it came.

In addition to this fee simple title in the undivided one-third he had a silent lien upon the whole premises for whatever valid claim he could maintain against his deceased father's estate.

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This lien, so far as the pleadings herein show, was kept within his own breast until after the partition sale and the distribution of the funds arising therefrom. He was in a position before that to know just exactly the net proceeds of the personal estate of his late father and to know what debts had been presented to the administrator.

I think we may safely presume under all the circumstances that up to the time of the distribution of the proceeds of the partition sale the administrator knew nothing of the claim of John W. Steen. And we must presume he would have done his duty and protected said estate as he should have done by laying claim to the proceeds thereof. So I think we may safely say that any claim against the estate or lien upon the real estate that he may have had remained locked in the bosom of John W. Steen, and until he saw fit to make it known no one else could do so.

The year not having expired in which he was required to make his claim known by presenting it to the administrator, was he then compelled to do so or be estopped?

In the case of *Williamson v. Jones*, American and English Decisions in Equity, Volume 4, the court (Supreme Court of Appeals of West Virginia) goes fully into estoppel. Paragraph 36, page 325, estoppel by concealment:

“The concealment of a material fact, by which the other party is led to believe in the existence of a different state of facts from that actually existing and to rely thereupon, is fraud equally with a misrepresentation of facts and will estop the one who is guilty of it from asserting the true state of affairs if such an assertion would injure the other party,” etc.

Paragraph 37, page 316, estopped by silence:

“Whenever the observance of good faith toward his fellow-man requires that one should disclose all that he knows in respect to a matter, silence as to any material fact, if it be the means of misleading another, who has the right to rely upon it and of inducing him to do any act or assume any position which he would not otherwise have done or assumed will estop the former from afterwards asserting to the prejudice of the latter the existence of the fact as to which he kept silent before. This

rule is tersely expressed in the following maxims:

“*Qui tacet consentire vi detur*, and

“One who is silent when he ought to speak will not be heard to speak when he ought to be silent.

“These maxims apply not only where a proposition is made to one which he is bound to affirm or deny, but also when he is silent in the face of facts which fairly call upon him to speak.”

The same principle is laid down in *State, ex rel Garrett et al, v. Van Horne*, 7 O. S., 327; *Buckingham et al v. Smith & Dille*, 10 O. S., 283.

“If one knowingly, though he does it impassively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice against such person. It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel.”

Paragraph 38, estopped by silence:

“Failure on the part of one who has title to property which another to his knowledge is about to purchase from a third person to disclose his title to the intending purchaser will estop him from asserting it afterwards if his silence formed an inducement to the purchase, and the same result will follow a failure to disclose a claim to or lien upon property to the prejudice of one who purchases on the faith of the non-existence of such claim or lien (or in other words who would not have purchased it at the price paid if he had known of the existence of such claim or lien).”

In the editor's note in the case of *In re Callahan's Estate*, Probate Reports, Annotated, Volume 2, page 693, we find many valuable references.

“What I induce my neighbor to regard as true is the truth as between us if he has been misled to my asseverations,” became a settled rule of property at a very early period in courts of equity.

There is no principle better established nor one founded on more solemn consideration of equity and public utility than that which declares that a man who knowingly, though he does it

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passively, looks on and suffers another to purchase or expend money on land under an erroneous opinion of title without making known his own claim shall not be permitted to exercise his legal right against such person. It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel.

Mr. Herman, in his Treatise on Estoppel and Res Adjudicata, says:

“The law is not so unjust or absurd as it has been too much the custom to represent. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case and in the policy of the law to prevent the great mischief resulting from uncertainty and want of confidence in the intercourse of men if they were permitted to deny that which they had deliberately asserted and received as true.”

Sir James Stephen's statement, “When one person by anything which he does or says or abstains from doing or saying intentionally causes or permits another person to believe a thing to be true and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed in any suit or proceedings between himself and such person or his representative in interest to deny the truth of that thing.”

A celebrated English case decided over fifty years ago is still regarded as controlling the principles that underlie this entire topic. Lord Denman delivered the opinion of the court:

“But the rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things existing at the same time. *Pickard v. Sears*, 6 Ad. El., 469.”

The editor says: “This is a leading case in which the seemingly inerradicable conservatism of the English courts gave way before the genius and legal acumen of a distinguished peer.”

The doctrine formulated in the above case has been received with great cordiality by the courts throughout the American states.

“The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice when nothing else could save them from defeat. It proceeds upon the grounds that he who has been silent as to his alleged right when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent. *Bank v. Lee*, 13 Pet., 107.”

“He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. 77 U. S., 1908.”

“The corner-stone of the entire equitable estoppel is that one who by language or conduct leads another to do what he would not otherwise have done shall not subject a person to loss or injury by disappointing the expectations upon which he is acting.” *Dickerson v. Colgrove*, 100 U. S., 578 (25 L. Ed., 618).

Mr. Justus Swayne, in the last noted case says: “The common law is reason, dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths.” *Beardsley v. Foot*, 14 O. S., 414.

In the case of *Williams v. Heller et al*, 13 N.P.(N.S.), 329, referred to in the brief of attorneys for defendants Arnold, and the cases therein cited, the rights and duties of parties to a partition suit are gone into quite fully. Among other things, we find therein the following, quoting from Hermann on Estoppel, Volume 1, pages 303 and 304:

“It is laid down as a rule that parties to a partition suit will be estopped to deny the findings and decrees or the recitals of the pleadings where they have been duly served and have had an opportunity to be heard. They have had their day in court. The deed in partition is made by the sheriff under an order of sale in partition and is the act of the parties themselves, and a purchaser at such sale is regarded as a grantee. The transfer to the purchaser is a complete extinguishment of the title of the parties to the action. Herman on Estoppel, Volume 1, page 304.” Many other authorities are to the same effect.

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It is attempted to be claimed in this case that John W. Steen, being a defendant in the partition suit, was not bound by the recitals of the petition, was not bound to set up his claim against his father's estate (which it is admitted was a lien against the land and not of record), and that a purchaser at the partition sale would take the land *cum onere* of the debts of the estate, although held by a necessary party to the partition suit.

The court can not accept that view. A partition suit is not an adverse proceeding in the usual sense of the term where the whole burden is upon the plaintiff, but is simply a method of securing to each party his rights in the property and all parties, as we have seen, are bound by the recitals and findings.

If John W. Steen had any other title claim or interest in the land than that set forth in the petition for partition, it was his duty to set it forth and make it known to the court and the other parties to the suit, and he should not now be allowed a right of action as against this land from the sale of which he in a suit where he was a necessary party was duly served, and received his full share of the proceeds.

But it is contended that this is a suit by the administrator of James Steen to secure funds to pay the indebtedness of his decedent's estate, and not the suit of John W. Steen; that the administrator was not a necessary nor proper party to the partition suit and now has a right to this action. That position would be true if the sale of the real estate in question were necessary to pay any just debts of the estate excepting a debt that a party to the partition suit should have made known at the time. But the personal property is amply sufficient, as we have heretofore seen, to pay all debts and costs of administration except the judgment of John W. Steen, and we are led irresistably to the conclusion that John W. Steen at the time of the partition suit had determined either to forego any claim that he might have had against his father's estate over and above any amount he might receive from the proceeds of the personal property belonging thereto after all other claims and expenses should have been paid; or he purposely concealed his claim that he might reap the benefit of the partition sale and then have the land

sold, from the proceeds of which he could collect his claim in full.

The first view is a more charitable one to take, the one in consonance with complete justice and to which the court thinks he should be held.

It is true that the administrator is the party plaintiff herein, but the defendant, John W. Steen, in the view the court has taken, is the sole party to be benefited by the sale. He should upon his judgment receive whatever may be left of the proceeds of the personal estate after the payment of the other debts and expenses are satisfied, as no one whomsoever would be injured by this, for he would, to the extent of the personal property applicable thereto, be entitled to the same against his sisters, although he had made no statement of his claim in the partition suit, for it is in full accord with the pleadings and findings in the case. The question of jurisdiction of the court is raised by the demurrers, but it seems plain to the court both under the General Code, 10783-10784, and under the case of *Doan v. Biteley*, 49 O. S., 588, that the court has ample jurisdiction to make any finding necessary to complete justice. Each and all of the separate demurrers therefore will be overruled.

NOTICE OF JUDICIAL SALE OF LANDS.

Common Pleas Court of Hamilton County.

WILLIAM HOPKINS, TREASURER, v. HAMER BRADBURY ET AL.

Decided, May 12, 1916.

Judicial Sales—Construction of Section 11678, Relating to Notice of Sale—Location of Land With More Particularity than Required by the Statute Not an Irregularity.

The purpose of Section 11678, providing that advertisements for the sale of lands shall contain the street number of the building, or if no such number exists the name of the street or road upon which the property is situated, etc., is to definitely inform the public of the location of said land, and it can not be considered

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an irregularity if the description used in the advertisement, instead of following the strict letter of the statute, locates the property with more particularity than the statute requires.

Louis H. Capelle, Assistant Prosecuting Attorney, for plaintiff.
Anthony B. Dunlap, contra.

GEOGHEGAN, J.

This matter was submitted on a motion for a rule filed by the sheriff of Hamilton county against J. B. Meifeld, a purchaser at a sale made under proceedings to sell property for the tax lien. The purchaser refused to take the property and resists the granting of the rule because of an alleged non-conformity of the advertisement under which the sale was made with the provisions of Section 11678, General Code.

That section is as follows:

“All notices and advertisements for the sale of lands and tenements located in a city or village in this state, made by virtue of proceedings in a court of record therein, in addition to a description of such lands and tenements, shall contain the street number of the building or buildings erected on the lands, or the street number of the lots offered for sale. If no such number exists, then the notice or advertisement must contain the name of the street or road upon which such lands and tenements are located, together with the names of the streets or roads immediately north and south or east and west of such lands and tenements, that cross or intersect the street or road upon which they are located.”

The advertisement, in so far as it applies to the lot of land purchased by Meifeld at the sale, is as follows:

“Situate in Sec. 14, Twp. 4, entire range 1, Hamilton county, Ohio, and known and designated as lot 55 in Terra Alta Subd. by J. W. Sibley, a plat of which is recorded in plat book 6, page 126, in the recorder's office of Hamilton county, Ohio, said lot No. 55 being 150 feet in front of the west side of Cherry street and extends back westwardly between parallel lines 175 feet and lies 780 feet, more or less, south of Belleview avenue.”

It is contended that the advertisement above quoted does not contain the names of the streets or roads immediately north and

south of the property advertised that cross or intersect the street or road upon which it is located, and, therefore, the advertisement not being in conformity with the provisions of Section 11678, General Code, the sale is not valid.

I do not think that under the circumstances the failure to give the names of the intersecting streets north and south is such an irregularity as will invalidate the sale. The object of the provisions of the section of the code referred to is to definitely apprise the public of the location of the lot. This is accomplished by the advertisement in this case. It is far more definite and certain to describe the lot as lying 780 feet south of Bellevue avenue than it is to describe the lot as simply lying between two streets.

It is a matter of common knowledge that there are many instances where it would be impossible to comply with the strict letter of the statute, such as in the case of blind streets, and a sale should not be held to be invalid where it would be impossible for the sheriff to advertise in conformity with the statute by reason of the peculiar location of the lot. As the statute is made for the protection of the purchaser, as well as to apprise the world of the proceedings to foreclose the tax lien, certainly it can not be considered an irregularity if the lot be described more particularly than the statute requires, although, perhaps, not in accordance with the strict letter of the statute.

I do not think that this finding is in conflict with the finding of the court of appeals of this county in the case of *Grieffenkamp v. Cresap*, 26 C.C.(N.S.), ——. In that case there was an omission to give the house number as well as the intersecting streets on either side of the property in question. The property, in so far as can be determined from the opinion, was simply described as the east twenty-five feet of lot No. 80, and the court there rightfully held that the failure to comply with the statute under discussion here was such an irregularity as would invalidate the sale. It is apparent that there is a substantial difference between the facts in the case at bar and the case decided by the court of appeals.

The motion for the rule will be granted.

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**JUDGMENT REVERSED FOR OFFENSIVE CONDUCT
OF COUNSEL.**

Common Pleas Court of Cuyahoga County.

A. M. GORDON V. JACOB KLEIN.

Decided, January 10, 1917.

Trial—Scenes of Disorder Among Counsel—Coupled With Offensive Conduct Afford Ground for Awarding a New Trial—Notwithstanding the Judgment is Supported by the Evidence.

In an action at law tried by the judge without the intervention of a jury, if the record shows an apparent fair preponderance of evidence in favor of the party against whom the judgment is rendered, a reviewing court will reverse the trial court where the record discloses such offensive conduct and repeated and prolonged scenes of disorder by counsel and contention between counsel and court as to unsettle the mental balance of the court and counsel and seriously disturb the orderly conduct of the trial. Under such circumstances, in the interest of justice, a new trial should be granted and the cause tried *de novo*, even if the judgment is not manifestly against the weight of the evidence, and notwithstanding the opportunity the trial judge had of seeing the witnesses and hearing them testify.

James Metzenbaum, for plaintiff in error.

Bernsteen & Bernsteen, contra.

FORAN, J.

This case comes into this court on error from the municipal court, in which judgment was rendered against the plaintiff for costs. The parties, therefore, stand here in the same relation they stood in the court below.

The action was on a written contract for commissions for the sale of real estate, and was tried to the court and decided March 3, 1915. Thereafter, on May 17th, 1915, a bill of exceptions was tendered to the trial judge, who, before allowing the same, interlined these words: "Amended so as to be a true bill of exceptions." The so-called amendments are in the handwriting of the

learned trial judge, and present to the reviewing court a rather peculiar and perplexing question of ethical procedure and judicial decorum. On the first page of the bill we find on the margin this somewhat unique and startling interlined amendment:

“Before the opening statement counsel for plaintiff asked the court if this branch of the court had any objections to hearing the case, stating that his reason for so asking was, that in error proceedings in the case of *The Euclid Beach & Supply Co. v. Kavanagh* from this court’s decision counsel for plaintiff had succeeded in having this court’s decision reversed. Fearing, therefore, there might be prejudice on the part of the court, counsel for plaintiff was assured the court was not prejudiced, but that, instead, his client would be dealt with according to law and the facts of the case.”

It is indeed truly refreshing to note that “counsel for the plaintiff was assured the court was not prejudiced, but that, instead, his client would be dealt with according to the law and the facts of the case.” We have here no wise, self-conscious, posing judge blinking like an owl, silent as a sphinx, with a head full of riddles and kinks, but a fearless jurist who cleaves the murky, disingenuous atmosphere of the trial table with a blinding flash of truth that a court is a forum where justice is dispensed and causes decided according to the law and the facts.

While this observation may seem trite, if not mildly satirical, it may nevertheless be timely, for counsel have, at times, a dim suspicion that the statement is not wholly true, and this suspicion may sometimes have a basis of truth in cases where a judge is acting in the dual capacity of trier of fact and expounder of law; for all men, including judges, irrespective of honesty of motive, may unconsciously be swayed or prejudiced by a bias subconsciously acquired.

In this case it is significant that the learned judge should have retained in his mind for two months and more the bitter impressions created during the trial by the rasping misconduct of counsel. The amendment just cited is, of course, not properly a part of the record. This the court undoubtedly fully appreciated, and its insertion must be regarded as mildly vindictive or meekly suggestive of judicial apology.

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Meeting this startling interpolation at the very forefront of our investigation, we were prepared to find the demon discord stalking into the court room and with wild tumult derange and throw out of balance the conventional decorum of the forum and unsettle and confuse the peace and mental equilibrium of the court, and perhaps tear from the court room walls the maxim "*ne vile fano*"; nor were we disappointed. If, in the former trial to which allusion is made, the court had murdered the pride of counsel, it soon arose at the trial table, a spirit of evil, and, like Banquo's ghost, shook its gory locks at the affrighted judge, and thereafter "Confusion heard his voice and wild uproar."

On page 4 we find that after an objection had been sustained, "counsel for plaintiff argued." This was bad form, but it is frequently tolerated, and may be proper as counsel may have suggestions to offer overlooked by the court. However, it is often indicative of a perturbed condition of mind upon the part of counsel. But why should this trivial incident be inserted as an amendment to the bill or record? We confess the answer eludes our comprehension.

Again, we find on page 6 that counsel was guilty of some impropriety, which, however, was "cut short" by some timely remarks by the court.

On page 67 we find counsel for the defendant, during the cross-examination of the plaintiff, addressed the court as follows: "Now, if your Honor please, I insist upon Gordon looking at me instead of at Mr. Metzenbaum." The record as presented to the trial judge shows nothing further except that counsel for plaintiff addressed some discourteous remarks to counsel for the defendant; but the bill as amended by the court presents this remarkable insertion or memorandum: "The court observed that the witness was looking at Mr. Metzenbaum as he answered questions, and that Mr. Metzenbaum was shaking his head from time to time."

If this was true—and we must assume it to be true because the bill or record imports verity—it was such unprofessional conduct on the part of counsel as would justify the court in taking such summary action as would have prevented its repetition

and taught counsel a lesson in legal ethics, which was conveniently forgotten if ever acquired. But the record does not show that counsel was even mildly admonished. And thus in confusion, contention and disorder the trial, if it can by courtesy be so called, proceeded or haltingly limped along, counsel for plaintiff evidently, like Tom O'Shanter's wife, nursing his wrath to keep it warm until, on pages 77 and 78, we find it bursting into flame over the edges of assumed restraint. At this point it seems that the court and counsel indulged in verbal pyrotechnics concerning some testimony counsel claimed the plaintiff had previously given. On the margin of page 77 the record is "amended so as to be a true bill of exceptions" by the insertion on the margin of the page of the following historical statement:

"At this period Mr. Metzenbaum ceased asking questions, and he and the stenographer spent seven minutes looking for the testimony which Mr. Metzenbaum declared Mr. Gordon had given. During this time Mr. Metzenbaum bore a sneering expression and was plainly trying to irritate the court. After seven minutes delay, during which no leave was asked or any statement made by Mr. Metzenbaum, the court ordered the case to proceed, telling Mr. Metzenbaum to ask further questions or call another witness."

If the trial of the cause was delayed seven minutes, as here related, it is quite evident that the court permitted and tolerated the delay. In the bill as presented to the trial judge the record shows that what the court said was: "You may ask him any questions, or call another witness." These words are erased and the marginal amendment above indicated inserted. The record then proceeds to say that counsel for plaintiff said: "Will the stenographer please make a record of the statement of the court and my exception to that." The court adds in writing to this statement of counsel these words: "This remark of Mr. Metzenbaum made with a sneering and irritated air." After some further disorderly procedure, the court ordered the plaintiff to leave the witness chair. An explanation of this incident is found by an inserted amendment on the margin of page 78, and reads as follows:

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“At this point the court said, ‘Mr. Gordon, you may step down. Mr. Metzenbaum, call another witness if you have any more testimony to offer.’ Again Mr. Metzenbaum remained silently defiant with disrespectful expression and manner. Up to this time in the trial of the case Mr. Metzenbaum’s conduct was practically continuously defiant and occasionally varied by contemptuous glances and grimaces, all of which the court attempted to forbear to notice.”

This court would be much benefitted and aided if there had been attached to the bill as an exhibit a photograph of the sneer of counsel for plaintiff, showing the silently defiant and disrespectful expression, as well as the contemptuous sneers indicated by the court. For aught that appears from the record, the facial expression complained of may be wholly natural. No doubt by this time the court felt like Douglas Jerrold, that the ugliest trades or professions have moments of pleasure, and that if he were a grave-digger or even a hangman, there were some people he could work for with a great deal of enjoyment; but why did the court permit justice or order to be “withered to a sneer”? The court had ample power to suppress contemptuous glances, sneers and grimaces, or any other disorderly or defiant conduct of counsel. By inserting these things in the record, it seems the court is apparently willing now to wound, though failing then to smite. It may be that when he observed the antics of counsel he saw “a laughing devil in his sneer,” and was more amused than offended; or perhaps he felt as did the poet who, observing the fantastic girations of a sportive simian, exclaimed:

“Look now at his odd grimaces;
“Saw you e’er such comic faces?”

Obviously, however, the court did not regard the unethical misconduct of counsel as the grotesque aberrations or the peevish, pettish tantrums of an unruly member of the bar, for he says he “attempted to forbear to notice it.” But if he attempted to ignore it then, why notice it now? He should either have suppressed it by the rigorous severity which order and decorum demanded, or he should have continued to treat it with the con-

tempt he believed at the time it merited. An appropriate criticism of the conduct of counsel and the attitude of the court will be found in *Railroad v. Pritschau*, 69 O. S., 448, where Shauck, J., in the opinion says:

“Throughout the record a trial judge, personally distinguished for learning and probity, appears as a grieved observer of continued improprieties which he thought himself powerless to suppress. It is entirely clear that he was unable to end them by admonition and entreaty, but he was clothed with ample power to suppress them inexorably. The county in which he sat has the full complement of county buildings.”

The senseless fear of counsel for the plaintiff that the court might not decide the case according to the law and the evidence because of his fancied belief that the court had some grievance against him indicates a mind dominated by the brooding ogre of suspicion, which furnishes some attorneys of narrow vision an excuse or an apology for their own lack of diligence and legal training.

The lawyer who, by open assertion or cowardly innuendo, intimates that a judge's decision was prompted by other than honest motives is a pestiferous nuisance, deserving only of pity and commiseration. To lawyers of this class, every judge who decides against him, or who seeks to enforce order or expedite business, is a rascal or is in collusion with the other side.

During the last forty years we have seen many judges on the bench, some of whom habitually wore an expression of surprise rather than of conscious strength, and whose acts at times might be termed the petty tyrannies characteristic of small men in accidental authority; but the judge whose rulings were actuated by corrupt motives we have never met or seen. Suspicion is not rooted in the mind of an honest man; it is a mirror in which some men see reflected the dark outlines of their own sinful souls. “All looks yellow to the jaundiced eye.” It was said of old by Milton that “Suspicion sleeps at Wisdom's gate,” but our experience is that this brooding demon never sleeps at all. We are toxemia. The calumnies it engenders never mislead or deceive consoled, however, by the reflection that it eventually dies of auto-

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the man of good will, and its shafts of venom rarely injure the man of rectitude who studiously ignores its confidentially whispered slanders.

There is at present a tendency toward greater freedom of action and speech in the American judicial forum. It may be true that the reign of the gown and mace is no longer desirable as impressive accessories of a court room. It should not be forgotten, however, that the lawyer, the litigant, the witness and the bystander will give and pay to the judge presiding in a court room only the respect and deference his conduct exacts and demands; and when freedom of speech and court room manners degenerate into town-meeting license, the administration of justice becomes a farce and respect for law and order vanishes and disappears.

In a recent letter to the president of the Cleveland Bar Association we said:

“The fact is there is too much politics practiced upon the bench; that is, the desire to avoid offending attorneys, or perhaps a desire to please them, is largely responsible for many evils in judicial procedure. Many lawyers are losing respect for the judges because the judges sometimes, by indifference to form, deportment and lack of firmness, forfeit respect lawyers would otherwise most cheerfully manifest and show upon all occasions and under all circumstances in the forum. Of course I do not mean offensive firmness or stilted, self-conscious form or deportment. We can all be true to the traditions of the bench and bar without loss of individual manly dignity. It may all be embraced in the maxim of St. Ambrose, which, freely translated, is, ‘When at Rome, do as the Romans do.’

“Any lawyer or judge can do, while engaged in judicial affairs or in the administration of justice, what always has been done in courts, without loss of respect or dignity. It will not injure any one of us to occasionally look in the old mirror of ethical and judicial fashion and be always true to the ethical and judicial form. If the legal profession is to retain the respect and confidence of the public, it must retain its *sui generis* character, its distinctive traditional individuality of the best and most accepted qualities of moral excellence. Some writer—I can not now recall—said that grandeur consists in form. If this be true, every man should be true to the form characteristic of his calling or profession. When I speak of form I mean that conduct which is in conformity to the long established proprieties, convention-

alities and usages of the courts and the legal profession or that ethical element of the law that has been imported into it by the greatest juridical minds of all the ages."

The greatest asset man can acquire or possess is that attribute of character which will, because of its prominence, impel all men to say of him that he is at all times and under all circumstances a cultured, affable gentleman. This is character stock which never fails in any walk of life to pay large dividends.

In one of his essays the poet Coventry Patmore said that noble manners is an art that continues to be practiced in Heaven after we pass into the other life; and he touches the very heart of the matter when he says that obedience is the secret of noble manners. This does not mean a servile obedience born of fawning sycophancy, but does mean that obedience which springs from and is rooted in love of harmony, law and authority. Obedience to the unchanging laws of life and conscious courtesy which it engenders, instead of degrading, ennobles and beautifies character and leads to dignified and graceful manners. The sun, moon, planets and stars unswervingly obey a great immutable law. As the existence of the universe depends upon harmony and order, so also does the social, physical and spiritual well-being of man. If men who practice and administer law as a profession do not, by example as well as by precept, teach obedience and respect for authority, how can they expect others to do else than follow in their footsteps?

There is in man an inclination to pride and self-will, and he seeks to justify the excesses that grow out of these tendencies by the claim that the assertion of individualism is a natural right, forgetful of the fact that order demands that every right be limited by or is limited by a duty. It has always been true that many believe, with Heine that "the Devil is really a handsome and charming man," and that those who advocate order and the reign of law are narrow-minded, disagreeable intruders whose activities ought to be suppressed. It was Cicero who said, "*Qui modeste paret videtur qui aliquando imperet dignus esse*" [he who obeys with modesty appears worthy of some day being a commander].

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Surely it is true that he who can conquer himself is entitled to greater praise than he who takes or conquers a city.

But it will be said that judges should possess such equanimity of spirit, poise and temperament as will at all times enable them to ignore the ebullient outbursts of the self-conscious young sapient of the bar who never heard of the admonition of the prophet, "Tarry at Jericho until your beards be grown." There is perhaps much truth in this contention, but suppose the judge has so schooled himself as to have absolute command of his tongue and facial muscles, still it must be admitted that, as a man, he feels, and the words of the Psalmist may be applied to him: "The words of his mouth were smoother than butter, but war was in his heart." And this being true, is he in such frame of mind as to accurately weigh testimony and correctly judge its value or detect its infirmities? If it be true that you "measure your mind's height by the shade it casts," who will say that there may not be dark confusing shades of thought reflected in a mind that has been under the influence of repeated and prolonged scenes of tumultuous disorder? The constant attrition and irritation of such scenes of tumult, disorder and distraction as this record discloses were certainly not calculated to produce serenity of mind and clarity of vision. It is often said that the mind is like a sheet of white paper in this, that black impressions remain longest upon it, and this is demonstrated by the so-called "amendments" the trial judge inserted in the record now before us. We have read the record very carefully, and while there is apparently a fair preponderance of evidence in favor of the plaintiff, yet the trial court having seen the witnesses and heard them testify, we are not prepared to say that the court, if the conditions were normal, reached an erroneous conclusion. But the conditions were not normal; and while counsel who created these conditions should not profit by his own wrong, yet it would be dangerous and unjust to punish a litigant for the misconduct of his counsel.

The situation we find is this: The plaintiff's evidence as disclosed by the record is of sufficient probative value and force to enable any intelligent mind to draw a rational conclusion

therefrom in support of the plaintiff's right to recover. This being true, should the judgment of the trial court be disturbed? Ordinarily, it would not be unless it was clearly and manifestly against the weight of the evidence.

At the conclusion of the testimony counsel for the plaintiff waived the opening argument, whereupon the court said he did not care to hear from counsel for defendant, and promptly dismissed the plaintiff's petition. Ordinarily, before a judge decides against the plaintiff he indicates to his counsel a desire to hear from him, if he has not already been heard, and points out to him wherein he has failed; and it sometimes happens that after a review and discussion of the evidence and the law the situation is so clarified that the judge may change his mind, or at least take time to carefully consider the law and the evidence from the plaintiff's point of view. We think, therefore, the abrupt termination of the trial rather significant. If the facts admitted of no rational conclusion except that reached by the court, it could be viewed as a well-merited rebuke to counsel; but to the reviewing court, in view of all the evidence and circumstances, it indicates an irritated, perturbed mental attitude, which, under more favorable and benign circumstances, the court would not assume. Hence we hold that in an action at law tried by the judge without the intervention of a jury, if the record shows an apparent fair preponderance of the evidence in favor of the party against whom the judgment is rendered, a reviewing court will reverse the trial court where the record discloses such offensive, repeated and prolonged scenes of disorder by counsel and contention between counsel and court as to unsettle the mental balance of court and counsel and seriously disturb the orderly conduct of the trial. Under such circumstances, in the interest of justice, a new trial should be granted and the cause tried *de novo*, even if the judgment is not manifestly against the weight of the evidence, and notwithstanding the opportunity the trial court had of seeing the witnesses and hearing them testify.

For the reasons indicated, the judgment of the municipal court will be reversed, because it is against the weight of the evidence, and the case will be remanded for further proceedings.

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Harvester Co. v. Baker.

**WANT OF KNOWLEDGE OF PROVISIONS OF A PROMISSORY
NOTE NOT A DEFENSE.**

Common Pleas Court of Franklin County.

THE INTERNATIONAL HARVESTER COMPANY V. DAUM ET AL; AND
THE INTERNATIONAL HARVESTER COMPANY V.
BAKER & DAUM ET AL.

Decided, January, 1917.

Note Payable on a Named Date—Contains Provision for Taking Judgment at Any Time—Failure of Maker to Discover this Provision Not a Defense.

In the absence of any showing of fraud or misrepresentation no defense is stated to a promissory note, having a specified time to run, by the allegation that the maker did not know the contract he was signing contained the provision that the payee might declare the debt due and take judgment thereon at any time he deemed himself insecure.

BIGGER, J.

Motion to vacate the judgment in each case.

As the question presented is the same in both cases they may be considered together. An answer has been tendered in each case and the question presented here is, do these answers state a defense to the cause of action stated in the petitions? In the opinion of the court the answers are not sufficient to constitute a defense. The warrant of attorney in these cases is plainly printed upon the face of the notes. By their terms the payee of the notes was given the option to declare the notes due at any time when the payee might deem himself insecure, and it authorized a confession of judgment at any time after the signing of the note, whether the same was due or not. Unless, therefore, the agent or agents of the plaintiff practiced some fraud upon the makers of the notes sued on to induce them to sign, there is no ground for vacating or suspending the judgments. There is no averment in the answers that any scheme or device was employed to prevent the makers from reading the terms of this

warrant, which are plainly printed upon the face of the notes. The averments of the answers on this point are the same and in the following language in case No. 73739:

“The defendants say that on the 14th day of November, 1916, the plaintiff presented to them for signature two notes described in its petition, which said notes the plaintiff represented to the defendant were notes for \$744 and \$642, due February 1st, 1917, and March 1st, 1917, respectively.”

This is the only averment of any statement made by the plaintiff touching the notes. It is, of course, stated that the plaintiff fraudulently and with the intention of deceiving the defendants, withheld from the defendants the information that said notes contained a clause purporting to authorize the plaintiff, at any time, whether the notes were due or not, to obtain a judgment by confession upon the same. It is true that the answer further states that: “Defendants did not know that said notes contained said clause or clauses, and would not have signed said notes had they so known, but on the contrary relied upon the representations of the plaintiff that said notes were notes not due and enforceable until the 1st day of February and the 1st day of March, 1917, respectively.” But this is far from being an averment that plaintiff did in fact state to defendant that the notes were not enforceable before that time. So that the only statement which it is averred the plaintiff made was that the notes were due on February 1st and March 1st, which is according to their plain terms. There are, however, a number of other conditions in the notes plainly printed on their face and there is no rule of law which imposed upon the plaintiff, when the notes were presented for signature, to state their terms to one who is able to read them, and there is no claim that defendants were unable to read.

In case of the execution of a note it is, of course, ordinary and usual for the parties to speak of the date when they are to be payable and there is nothing more stated in the answers than that this date was fixed and that it was stated by plaintiff.

It is a well established principle of law, settled by a long line

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of decisions, that it is the duty of every person who enters into a contract, to learn its contents before he signs it. The law is thus stated in 9th Cyc., at page 388:

“As a written contract is the highest evidence of the terms of an agreement between the parties to it, it is the duty of every contracting party to learn and know its contents before he signs it. He owes this duty to the other party to the contract, because the latter may and probably will pay his money and shape his action in reliance upon the agreement. He owes it to the public, which, as a matter of public policy towards the written contract, has a conclusive answer to the question, what was the agreement. Hence the courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms; that he did not read the document which he signed; that he supposed it was different in its terms or that it was a mere form.”

This statement of the doctrine is supported by a long line of decisions. Of course, the rule is that if one induces another to sign a paper without reading it or to rely on his statement of its contents, and states the contents falsely, that it may be avoided for the fraud. The only averment, however, in this answer of any statement as to its contents is as to the date when the note falls due, which was plainly written at the head of it. There is no averment that the plaintiff made any statement as to the contents or terms of the note beyond that, nor that any device or scheme was used to prevent defendants from reading the note, which, if done, would have shown that while by its terms it was made to fall due on a certain date, that included in the note was also a provision that the plaintiff might take judgment on it before it was due by its terms. There is no averment of any effort to conceal this provision from the defendant.

While there is no decision in Ohio upon the question so far as I have found, it has been settled in other jurisdictions that a judgment on a note before the same is due may be authorized by the terms of the contract. 151 Ill., 240; 188 Pa. St., 393; 143 Pa. St., 525; 63 Ill. App., 211. The last case is almost identical with the case at bar.

It is further claimed that the ordinance is unreasonable and indefinite.

I think that an ordinance should not be held to be unreasonable which is clearly authorized by the Legislature, and I think that while the court has power to declare an ordinance unreasonable, the exercise of that power should be restricted to cases where the Legislature has enacted nothing on the subject-matter of the ordinance. In this case, it appearing that the ordinance is authorized by the Legislature, I think it would be going too far to say that it is unreasonable and indefinite.

The further claim is made that the applicant is denied the right to trial by jury.

If the applicant is entitled to a trial by jury it is enough to say that his right to such trial is fully protected and secured by Section 4577 of the General Code.

The final contention is that the punishment provided by said ordinance is excessive.

The provisions of Section 3665, General Code, declare what punishment may be inflicted for offenses specified in Section 3664, of which the offense in this case is not one, and therefore Section 3665 does not determine the limit of punishment that may be inflicted in this case.

This case comes within the provisions of Section 3628 of the General Code, which is as follows:

“Section 3628. To make the violation of ordinances a misdemeanor and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months.”

It is apparent, therefore, that the penalty section of said ordinance is clearly within the limit prescribed by said Section 3628.

Therefore, upon all considerations affecting this case, I am very clearly of the opinion that the writ must be discharged. Ordered accordingly.

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Heald v. City of Cleveland.

**IS THE BUILDING OF A PUBLIC HALL FOR AUDITORIUM AND
EXPOSITION PURPOSES WITHIN THE POWER
OF A MUNICIPALITY.**

Common Pleas Court of Cuyahoga County.

J. C. HEALD V. CITY OF CLEVELAND, AND HARRY L. DAVIS, MAYOR
OF THE CITY OF CLEVELAND.

Decided, December 14, 1916.

Municipal Corporations—Authority to Acquire Land and Build a Public Hall for Auditorium and Exposition Purposes—After an Issue of Bonds Therefor Has Been Approved by Referendum Vote—Action by City Through its Director of Law to Enjoin the Issue—Application by a Tax-payer to Intervene—Function of Municipal Government—Limitations on the Power of Taxation—Judicial Constructions of the Words "Public Purpose"—Is a Convention Hall a Public Utility—Determination as to the Plan, Design, Location and Character of Such a Hall Not an Administrative Function—Has a Municipality Authority to Collect Rents for Use of a Hall—An Action by the Director of Law is an Action in Behalf of Every Tax-payer of the City.

1. A resolution by a city council, declaring the necessity of issuing bonds in excess of the permissible amount for the erection of a public hall for auditorium and exposition purposes and acquiring the land necessary therefor, is not an emergency resolution within the provisions of the state Constitution and the charter of the city of Cleveland.
2. The city of Cleveland has authority to build a hall for auditorium purposes and to issue bonds therefor, and may use such auditorium for any lawful purpose and derive revenue from such use; but said city has no authority to issue bonds to be used primarily for a building for exposition purposes, or to use portions of its auditorium for lodge rooms, concert halls, show rooms, or theaters, as a purely private enterprise.
3. An action brought in good faith by the director of law in the common pleas court, having the same parties and interests identical with those of the present action and determined after a full hearing on the merits and the judgment thereafter affirmed by the court of appeals, the issues whereof were the same as in the present suit or could have been properly presented, renders the ques-

tions so determined *res judicata*; but the question of the right of the mayor of the city to cause to be constructed in said auditorium rooms for shows, concerts, lodge purposes, etc., for the purpose of deriving revenue by leasing such rooms to private persons, was not put in issue in the former suit and the determination in that action is therefore not *res judicata*.

4. In the absence of any action by the city council as to the plan or design of the proposed auditorium building, allegations of the petition as to its contemplated use are anticipatory, speculative and premature, and are not before the court for adjudication.
5. In designing the proposed auditorium the city may lawfully provide rooms other than the auditorium for purely civic and municipal purposes; and when such rooms are not needed for such purposes, the city may derive revenue therefrom by lease or otherwise.

John C. Heald, for plaintiff.

City Solicitor, contra.

FORAN, J.

On the 28th day of February, 1916, the city council of the city of Cleveland duly and regularly passed a resolution declaring the necessity of issuing bonds of the city in excess of an aggregate of 2½% of its tax duplicate of 1916, for the erection of a public hall for auditorium and exposition purposes and acquiring the land necessary therefor, in the sum of \$2,500,000, the resolution providing that the question of issuing and selling the said bonds be submitted to a vote of the qualified electors of the city at a special election to be held on the 25th day of April, 1916, of which special election the mayor was directed to give the usual and legally required public notice. The council also declared the resolution to be an emergency. On the first day of March, 1916, John C. Heald, a resident and tax-payer of the city of Cleveland, requested in writing W. S. FitzGerald, the director of law of said city, to institute proceedings in the Court of Common Pleas of Cuyahoga County, Ohio, against the said city and Harry L. Davis, its mayor, and the members of the board of deputy state supervisors and inspectors of elections, enjoining the said mayor from issuing the proclamation for said special election and en-

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joining the members of said board of elections from making arrangements for holding said election, for the reason that the contemplated expenditure of money for the erection of said building is not authorized by law, and that the resolution of the city council providing therefor is illegal and void. In compliance with this request, the director of law, on the 8th day of March, 1916, filed in this court a petition, being cause No. 148,749, on behalf of the city of Cleveland and against all the parties, except the city, named in the request, and for the purposes therein named and contemplated. On March 9th, 1916, waiver of issue and service of process and entry of appearance was filed by defendant, Mr. Ben. C. Wickham appearing for the mayor, and Mr. A. A. Cartwright appearing for the members of the board of elections. Both of these gentlemen are assistants to the director in the department of law.

On March 11, 1916, John C. Heald, as a resident tax-payer, filed an affidavit in said case in support of a request to intervene by petition and become a party to the action. The intervening petition tendered by Mr. Heald is substantially such a petition as Mr. Heald would have filed if the director of law had not acceded to his written request of March 1, 1916; nor does it differ materially from the petition filed by the director of law.

The application to intervene was refused by the court, and we think properly so, as his right to file such petition depended solely upon the refusal of the director of law to bring the contemplated action.

March 15, 1916, Mr. Heald, in writing, requested the director of law to amend the petition filed by him in certain respects, which request was complied with to the entire satisfaction of Mr. Heald, who was also accorded the courtesy of appearing in the case as attorney and taking part in the argument.

On March 31, 1916, the defendants, by their respective attorneys, filed a demurrer challenging the sufficiency of the facts stated in the amended petition to constitute a cause of action against them. This demurrer was overruled *pro forma* by the court of common pleas, to which ruling exception was duly

taken, and petition in error filed in the court of appeals April 5, 1916. The cause was presented to the court of appeals April 12, 1916, the city of Cleveland being practically represented by Mr. Heald, though he does not appear as attorney of record.

On April 22, 1916, the court of appeals sustained the ruling of the court of common pleas, and thereafter the director of law refused a request by Mr. Heald to apply to the Supreme Court for certification of record to that court, on the ground that the election having been held on April 25, 1916, there was nothing left in the case for the Supreme Court to review.

Thereafter on May 18, 1916, the proceeding now before the court was instituted by Mr. Heald, and on September 30, 1916, an amended petition was filed.

The plaintiff, John C. Heald, as a resident tax-payer of the city of Cleveland, brings the action, being cause No. 149,848, against the defendants, the city of Cleveland and Harry L. Davis, mayor of said city. The petition is in all essential respects substantially the same as the amended petition in cause 148,749, instituted by the director of law at the written request of the plaintiff herein, except that it contains averments which may be termed a second cause of action, the substance of these additional averments being that the city of Cleveland is at this time facing a deficit in operating and maintenance expenses of over three and one-half million dollars, and that during the year 1917 the defendant city may be required to, and of necessity must, expend this amount of money in excess of the maximum amount it will derive from all available sources of revenue to efficiently maintain the usual activities and running expenses of the municipality; and further, that there is no provision of law whereby this deficit can be provided for, met or discharged, and that therefore and by reason thereof the defendant city is financially unable to construct, operate and maintain the proposed auditorium and at the same time efficiently discharge its functions of government as required by law.

The prayer of the petition is, that the defendant, Harry L. Davis, as mayor, be enjoined from disposing of or selling the

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bonds voted for at the special election of April 25, 1916, under the resolution of the council of February 28, 1916, and from delivering to the sinking fund commission any part or portion of said bonds.

The court is further asked to determine and find "that the contemplated erection of said building is beyond the scope and power of the municipal corporation of the city of Cleveland."

The joint answer of the defendants contains two defenses: first, a general denial, save and except as limited by certain admissions; and second, a plea of *res judicata*, that the averments and matters in the petition, traversed by the general denial, were litigated and adjudicated in cause 148,749, being the proceeding instituted by the director of law at the instance and request of plaintiff herein.

With respect to the allegations in the second cause of action, the record discloses the city of Cleveland, under the co-called Longworth act and related and amendatory acts, may, by vote of the electors, contract and incur additional indebtedness aggregating nearly seventeen million dollars on the basis of the tax duplicate of 1916.

It is true that the city of Cleveland, in common with all the large cities of Ohio, is so financially embarrassed at this time that, unless relief is afforded by the Legislature, its credit will be seriously impaired. Under such circumstances it may not be wise to incur large additional obligations for the promotion of civic enterprises of questionable legality and doubtful expediency. But this is wholly a question of administrative policy, unless it clearly appear that the legal line is to be crossed; and the trend of recent authority seems to be that home rule charters and laws for the promotion of municipal local self-government are to be liberally construed; and where doubt exists it will be resolved in favor of the municipality. Cities in the United States are comparatively young. To build a new city along modern lines and with all modern conveniences for safety and comfort is exceedingly expensive, and it is not unjust or unfair that future generations be required to bear a portion of the bur-

den, as they will certainly reap many of the benefits. Obviously, however, there is a limit beyond which disaster looms and casts a menacing shadow, for the loss of credit prestige is not compensated by the dubious consolation of knowing that if we can not pay we will soon be in a position where we can not owe. But as has been said, this is a question of policy or of morals, and not of law; and the allegations of the petition relating to the financial condition of the city will be eliminated from further consideration. In any event we are not disposed to cavil at municipal bond indebtedness created for the purpose of making necessary improvements.

All economists, social as well as political, seem to agree that where public moneys are honestly and judiciously expended for proper municipal purposes, taxation for such purposes measures the state and condition of civilization and social progress found in such municipality.

By the prayer of the petition the court is asked to determine and hold that the contemplated erection of a public hall for the city of Cleveland, for auditorium and exposition purposes, is beyond its scope and power. A few general observations may throw some light upon a question involved in doubts and uncertainties that courts seem unable to wholly dissipate in clear and unmistakable terms. This perhaps grows out of complex difficulties inherent in social conditions and activities. Municipalities, as we now find them, are at one and the same time decentralized portions of general government and corporation organizations of property owners for the administration of private property. While these are found submerged in the general function of municipal government, the distinction should not be lost sight of. The modern tendency is to enlarge the scope of the first part of this proposition and to ignore the latter. The enactment and enforcement of ordinances for the preservation of public peace, public health and public morals is a state function which may be performed by a local government by virtue of grants of power from the Legislature or the state, and perhaps inherently by the exercise of police power, which we

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think is extended to municipalities by the home rule amendment to the Constitution. The enactment of an ordinance for paving and improving a street is primarily a mere instrument to make and enforce a contract between property owners for mutual convenience and benefit in the using of the street. In times not very remote the expense of improving and lighting streets was borne by the property owners without calling upon the local government to perform that function for them. As cities grew and expanded, the confusion resulting from such mode of improvement had to be obviated by centralizing the power in the local government; but the principle remains, and some consideration is still due owners of property on streets where improvements are made.

A municipality is, then, a subordinate branch of the state government exercising, according to our theory of the decentralization of power, at a certain locality the functions of state government. In other words, it is one of the creatures of the state to exercise, within a limited sphere, the functions and powers of the state. *U. S. v. R. R. Co.*, 17 Wall., 329; *New Orleans v. Clark*, 95 U. S., 653.

Before the constitutional amendments of September, 1912, municipal corporations in Ohio, under the Constitution of 1851, were created and governed by general acts of incorporation. They had no inherent power to pass ordinances or enact laws. They had no power in this respect except such powers as were expressly and clearly conferred or granted by the state or which necessarily may be implied by clear intendment in order to carry into effect the powers expressly granted. In this respect the distinction between constitutional and statutory provision obtains. A constitution is the basic foundation or organic law of the state in which rests the supreme power so far as delegated by the people in their sovereign capacity. A statute is the written will of the governing body of the Legislature created by the Constitution. This governing body can not exceed the powers granted to it by the Constitution. Any power not expressly granted or fairly and necessarily implied to carry

into effect the powers expressly granted is retained. Municipal corporations are agencies or municipalities to which the Legislature delegates a portion of the governmental powers vested in it in order to meet local conditions and wants pertaining to populous communities for which the Legislature makes only general provision. Any power not so expressly delegated or which may be necessarily implied to carry into effect the powers so expressly granted is retained by the state.

The absolute right of the Legislature to interfere at will and change the mode of government of any particular municipality was limited by constitutional restrictions; but the restrictions, before September, 1912, were often openly evaded for purely political reasons; and boss rule, made possible by ripper legislation, became a menace to property, peace and social order. The strenuous and insistent demand for relief found expression in the home rule amendment of September, 1912, which gives to municipalities "all powers of local self-government * * * not in conflict with general laws" (Section 3, Article XVIII), and this must be taken to mean that any power or authority the state can properly confer upon a city operating under a local self-government charter, that power or authority the city may itself exercise, provided it be not in conflict with general laws. The home rule amendment "parcels out a definite branch of *paramount* sovereignty of the commonwealth to certain territorial subdivisions of the state." Wilkin, J., in *State, ex rel, v. Lynch*, 88 O. S., 101. "Since municipalities get their powers from the state, it is mathematically certain they can include no power not possessed by the state. Local self-government is necessarily a part of government less than the whole." Shauck, J., *State, ex rel, v. Lynch, supra*. In this case Justice Shauck delivered the opinion of the court, and it quite clearly appears from the language just quoted that for all local purposes a city, under the home rule charter, may exercise paramount sovereignty. It can not, as Shauck, J., points out, exercise powers not possessed by the state; but here there is a clear admission that it may exercise for local purposes any power possessed by

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the state. And this construction has been given to all freeholder charters in states whose constitutions provide therefor. A city government is a part of state government, but in that part and for purposes legitimately pertaining thereto it has *ex necessitate* paramount sovereignty. See 81 Minn., 79; 106 Minn., 94.

Speaking of the opportunities which may be presented and offered for the expenditure of public money in cities governed by home rule charters, and the necessity for limiting and curbing extravagance, Shauck, J., said, page 95, *State, ex rel, v. Lynch, supra*: "Obviously there are far-reaching laws which can not be annulled by statutes or constitutional amendments." This is a broad assertion, for it in fact means that the people, in their sovereign capacity, are above the Constitution and above laws; and that there are certain well defined sociological principles which can not be ignored without involving the state in common ruin.

What are these laws of which Justice Shauck speaks? They are social and economical, the law of competitive forces, the law of individualism, of *laissez faire*, the law of supply and demand, and among others including the law of diminishing returns and the law of compensation. The laws of competition are as immutable as the laws of matter. Every individual has an indefeasible right to use his powers and faculties or forces as he may deem best, not inconsistent with the general welfare, the test being, to what extent can each citizen be permitted to have freedom of action without injury to all the rest? In the social order we find three clashing, warring instincts or forces, individual egoism, social affection (altruism) and state ambition. If man is to progress and social order survive, it is supremely essential that no one of these forces shall destroy the other. It is a lesson of history that at intervals there appear misguided, discontented spirits, often benign and sociolistic, who dream "of a fixation of relative values by governmental regulation." Their activities are often justifiable, for competition is at times fierce and cruel; but they fail to recognize that it is a

state action are difficult to define. Still more difficult of definition is the answer to the question, what should the state do for the citizen, and to what extent may the state interfere with the activities of the citizen?

It may be assumed that the consensus of opinion, based upon the experience of mankind, is a general presumption against state interference, except the necessity therefor be real and great. The powers of the state are already so dominant that individual freedom and personal liberty are constantly in danger. In the nature of things there must be some assignable limits to the power of the state. We have already intimated that this limit is passed when the state seeks to do for the individual that which he can voluntarily do himself. The *laissez faire* maxim—let alone, or do not govern too much—is a good one to follow and keep in mind. Hence the state should not engage in private enterprises or competitive activities. Wherever and whenever government has sought to direct the activities of the citizen, the result was disastrous. "It is an eternal experience that every man who has power is inclined to abuse it." (Montesquieu.) There are two schools of thought on this subject, those who seek to curtail and those who seek to enlarge governmental activity or power. Between the two there is a common middle course upon which all should agree. There are many careful and thoughtful jurists who incline to the belief that the primary duty of government is to protect, that is, to maintain the rights of its citizens to life, liberty and property. This is the basic idea of the Declaration of Independence.

In *U. S. v. Cruikshank et al*, 92 U. S., 542, Chief Justice Waite said, page 549:

"Citizens are members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of the general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, when called

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upon, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose."

By what stretch of the imagination can it be said that affording a community free opportunity to hear music and lectures is a paramount exercise of governmental power? If the governmental function is limited to the protection of the citizen, and it can exercise no other power, that limit will be exceeded if some of the things set forth in the plaintiff's petition are to be performed under the resolution of February 28, 1916. But as we shall undertake presently to show, we think this is largely a matter of surmise and speculation upon the part of the plaintiff.

The greatest power exercised by government is the power to tax. This power is not only an incident to government, it is indispensable to its existence. However, "the power to tax involves the power to destroy." *McCullough v. Maryland*, 4 Wheat., 316. This language was used by Chief Justice Marshall; and the same eminent jurist, in *Weston v. City of Charleston*, 2 Pet., 449, said:

"That if the right to impose tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the law of each state and corporation may prescribe."

"There is nothing poetical about tax laws. When they find property, they claim a contribution for its protection." *Tinley v. State*, 22 Pa., 381.

These considerations pointedly suggest the necessity of limiting this tremendous power; and by Section 13 of Article XVIII of the Constitution the state has reserved the right to limit the power of its cities to levy taxes and incur debts for local purposes.

It must be conceded that public moneys should only be used for a public purpose. "No authority, or even dictum, can be found which asserts that there can be any legitimate taxation when the money to be raised does not go into the public treasury, or is not destined for the use of the government or some of the governmental divisions of the state." 27 Iowa, 28.

That legitimate taxation should be limited to public purposes is axiomatic. The very meaning of the term excludes the claim that the public revenues can be used for private objects or purposes. This is important, as, by what may be called the diffusion of taxes, every human being who is a consumer of the products of labor is a tax-payer; and ultimately the great consumer, and not necessarily the large property owner, is the great tax-payer. The laws which regulate the distribution of wealth are beyond the sphere of government; but the state has power to equalize the burdens of society among its members in proportion to their wealth. While consumers may regulate the amount of taxes they pay, owners of what is sometimes called non-taxable wealth should not be permitted to do so. Beyond cavil there can be no lawful tax which is not laid for a public purpose. It may not always be easy to decide what is a public purpose. It is sometimes said, and it is claimed by counsel for defendant in this case, that a public hall for auditorium and exposition purposes will be a benefit to the public, in that it will be the means of drawing to the city great crowds of people from other sections of the country who will expend money among our citizens. But as Justice Miller said in *Loan Association v. Topeka*, 87 U. S., 655: "The same may be said of any other business or pursuit which employs capital or labor." That said grants of power to municipal corporations must be strictly construed, and that funds raised or provided by them, especially by a vote of the electors, for a specific purpose named in the resolution or ordinance, can not be diverted and used for an entirely different purpose, is fundamental and need not be discussed. That taxes can only be used for a public purpose is also elementary. But there is a wide latitude of judicial opinion as to what consti-

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tutes a public purpose. There is general unanimity, however, that moneys can not be lawfully used to promote private enterprises. And this is especially true if these enterprises are to come into direct competition with others of a similar character, such as are usually managed, owned and controlled by private persons. Practically all the authorities cited by plaintiff to support the contention that the purpose of the defendant city is *ultra vires*, fully sustain these general propositions; but the question still remains, is the erection of a building for auditorium and exposition purposes a municipal affair or a proper function of municipal government?

Section 3, Article I of the Constitution provides, among other things, that the "people have the right to assemble together in a peaceable manner to consult for their common good." This is in the main an affirmance of the principle guaranteed by the Federal Constitution.

It will no doubt be claimed that these constitutional provisions simply provide that the right of the people to peaceably assemble for the purposes stipulated shall not be infringed upon or interfered with by the state, and this is the extent of the right. This contention is too narrow, and loses sight of the fact that the right to assemble involves a duty. The right of suffrage involves the duties of citizenship; and when these duties are not exercised, the liberty, person and property of the citizen is endangered.

In *U. S. v. Cruikshank*, 92 O. S., *supra*, it is said in the fifth syllabus that:

"The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or *for anything else connected with the powers or duties of the national government*, is an attribute of national citizenship, * * *. The very idea of a government republican in form implies that right."

If the right to assemble is an attribute of national citizenship, or a characteristic and distinguishing mark of citizenship, then it should be exercised, and hence Chief Justice Waite held that

it was not only the right but the duty of a recently enfranchised race to assemble for all lawful purposes pertaining to the welfare of the race. The right to assemble involves the power and the ability to assemble and provide the necessary facilities therefor. We have long since passed the town meeting period of our history. In the winter season, in most portions of the United States, the people can not assemble in an auditorium that has only the sky for a roof. It may be said they can rent a suitable hall for such purpose, but why should a dozen or two public spirited citizens be required to bear a burden pertaining to one hundred thousand citizens? The majority of our citizens can only be aroused by an earthquake shock and menace. When a public duty is urgent, there is always a Thomas who is willing that George shall assume the performance of the duty, Thomas knowing that the benefit will inure to him without effort. Man is so extremely selfish and hedonistic that he frequently forgets that eternal vigilance is the price of liberty.

In *Denver v. Hallett*, 34 Col., 393, the court practically held that, even admitting an auditorium is not essential to the declared objects and purposes of a municipality, still the constitutional provision providing for municipal home rule so enlarged the powers usually granted by the Legislature that the power to provide such auditorium could be exercised by the city of Denver; in other words there was an inherent power in the city which could be invoked by reason of the home rule provisions of the Constitution. This power innately existing as a necessary element of municipal government, must have its basis in some quality or attribute characterizing all rights growing out of social necessity and fundamental to the preservation of individual protection and liberty, which the right to assemble strongly tends to conserve.

Counsel for the defendant cites *State, ex rel, v. Barnes*, 22 Oklahoma, 191, as being *in pare passu*. The citation is not felicitous. It was there held that the city of Guthrie could build a convention hall for public uses as a public utility. The Constitution of Oklahoma provides that municipalities may incur

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indebtedness "for the purpose of purchasing or constructing public utilities, or for repairing the same," and the court held that a convention hall was a public utility; and in so doing, in our opinion, stretched the doctrine of legal exegesis to the breaking point.

Sections 4 and 5, Article XVIII of the Ohio Constitution, provides that any municipality may acquire, construct, own, lease, and operate a public utility; but these sections taken in connection with the remaining section clearly indicate that the utility meant is limited to lighting, furnishing water, common carrier facilities, and kindred or like utilities.

Section 12, Article XVIII, however, provides that the bonded indebtedness incurred for such utilities "shall be secured only upon the property and revenue of such public utility, including franchise," and "shall not impose any liability upon such municipality." So that it will be seen that this citation is not in point, except in so far as it indicates the extreme limit to which the Supreme Court of Oklahoma extended the doctrine of construction to enable the city of Guthrie to construct a convention hall for public purposes. We think, however, that the Supreme Court of this state has practically and in effect decided the question.

In *State, ex rel, v. Turner*, 93 O. S., 379, it appears that the city of Akron owned some real estate worth approximately \$65,000, and deeded the same to the state of Ohio for the purpose of building an armory thereon, under and by virtue of Section 5256, General Code, which authorizes the state armory board to receive gifts of land, among other property, for the purpose of aiding in the purchase, building, furnishing and maintaining of an armory building. The city of Akron, however, reserved the right, in its deed, to the use of a certain portion of the building to be erected for rooms suitable for the drill and instruction of the police and firemen of the city of Akron, and an auditorium available to the city of Akron for all civic purposes not interfering with the proper use of the armory by the state militia. The state appropriated \$115,000 for the erection of the armory. The state armory board prepared and adopted plans for the

armory building. The relator, the Climmer & Johnson Company, was awarded the bid or the contract for the construction of the armory, and an action in mandamus was brought to compel the Attorney-General (Turner) to draw the necessary contracts for awarding the bid to the relator, which the respondent had refused to do. The fourth part of the syllabus reads:

“An averment in a pleading that the plans adopted by the state armory board for an armory building include an auditorium that will be available for civic purposes, does not tender any issue that the state armory board, in adopting such plans, abused its discretion or was guilty of any fraudulent conduct in reference thereto.”

On page 388, Donahue, J., says:

“The city of Akron has a right to build an auditorium for civic purposes. It has a right to provide for a room or rooms for the drill and instruction of its police and firemen, and for this purpose it is authorized to levy taxes upon all property within the corporate limits.”

The dictum of this case goes further than the application of the functions of government to the protection of the citizen. The right to have a room for the drill and instruction of police may properly be said to have relation to the protective functions of government; but the right to build an auditorium for civic purposes can not be said, strictly speaking, to fall into that classification; and it must be said to proceed from the exercise of the power indirectly, and growing out of the right of the people to assemble for civic purposes, and to consult for their common good, as it is provided by the Constitution they may do.

There still remains the question, has the city of Cleveland the power conferred by statute, by charter, or inherently under the enlarged powers of local self-government conferred by the home rule provisions of the Constitution, to erect a hall or building for exposition purposes?

Section 3939 of the General Code provides that the council of a municipal corporation may, by an affirmative vote of not less than two-thirds of the members, by resolution or ordinance,

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issue and sell bonds in the manner therein provided for certain purposes, among which, as provided in the tenth subdivision of the section, is "for erecting public halls and public offices."

It will be noticed that the word "public" is repeated after the conjunction "and" in this subdivision. The word "and," as defined in the Century Dictionary, is a colorless particle without an exact synonym in English, but expressed approximately by "with," "along with," "together with," "also," "moreover," the elements connected being grammatically co-ordinate.

Owing to the repetition of the word "public," we think the Legislature intended and meant to say that the cities of Ohio could, under Section 3939, General Code, incur obligations or indebtedness, in the manner provided in the section, for erecting public halls, and also or moreover for erecting public offices, or that the city could erect public halls together with public offices; and that the construction contended for by plaintiff is too circumscribed and too narrow. The plaintiff calls attention to the fact that the city of Cleveland has already what is popularly called a city hall; and it is claimed that this building has ample space for the accommodation of the officials and business of the city for the next fifty years. The record shows that this is hardly in conformity with the facts, for it appears that this so-called city hall is not sufficient for the city needs and is already over-crowded. As originally planned, it perhaps would be sufficient for the city needs for the next fifty years, but a spasm or waive of false economy resulted in the construction of a much smaller and more circumscribed building. Strictly speaking, the so-called city hall is simply an administration building or collection of offices for city purposes, and nothing more. It includes a council chamber and rooms for the administration of justice, that is, court rooms for the municipal court, which never should have been located in this building, as, owing to the confusion incident to carrying on the work of a popular court of this character, much annoyance and interference will necessarily result to the orderly transaction of the public business.

The word "hall" in this country has not the broad meaning that it has in England, where practically every large building is called a hall, including private residences.

A building for exposition purposes may, by a very liberal definition, be called a hall; but to the ordinary man an exposition building means a place where shows or circuses may be held, or the products of art and manufacture be exhibited, primarily for advertising and sale purposes, but incidentally for the purpose of showing the progress in art and manufacture, and to this extent educational, but of a character not included in the functions of government.

Schools purely technicological in character and schools for the inculcation of esthetics, the science and theory of beauty in perception and expression, belong to the domain of private enterprise. State education, that is, education designed for the public *en masse* or as a whole, is limited in its scope to the ordinary demands and requirements of good citizenship. . We can not all be artists and technicological experts, and those who desire to be such should not call upon the public to aid their ambition, however laudible and praiseworthy.

The use of the contemplated building for exposition purposes we think unwarranted, unless the doctrine of state socialism is to be considerably advanced, and so advanced as to foster, promote and encourage improvidence and poverty. This does not mean, however, that the auditorium which the city has power to build, erect and maintain, might not be used for such purposes after its construction. It only means that a municipality may not use or appropriate public funds for the erection and maintenance of a building designed primarily for exposition purposes. That a municipality has the right to make any lawful use of a building it has power to erect and the right to own and maintain, can not be denied, during such periods as its use may not be required by the public.

The word "auditorium," as used in the resolution of council, must be given its popular and not its restricted meaning, that is, a room of large capacity capable of accommodating a large assemblage of people. The extent and character of the hall or room is indicated by the amount of money raised or appropriated for its erection. If the power and the right to provide such a building arises out of the inherent right of the people to assemble to

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consult for their common good, or for any lawful purpose, or to petition for a redress of grievances, it must of course be free and open to all people, subject to proper rules and regulations to prevent an abuse of the right. We apprehend the city would have a right to prevent the assembling of persons whose purposes may be inimical to society and subversive of social order. Assuming that the people would only demand the use of the auditorium for proper purposes, it must be conceded that such use will necessarily be infrequent, at least only when necessity therefor arises. If its use is confined to these specific purposes, it will necessarily be unoccupied perhaps two-thirds of the time; and we see no reason, legal or otherwise, why the city may not, during such period, derive revenue from its use by private parties who may desire to occupy it for conventions or exposition purposes or for purposes not strictly competitive. As there is no room of the seating capacity of the contemplated auditorium in this city, and perhaps never will be, it can not be said the city, in renting it when not needed for public use, will be engaging in a private enterprise in competition with similar enterprises, as the possibility of there being a similar enterprise or one of like character is so remote as to be purely speculative. This must be the view taken by the court of appeals when the question was presented to it, as the resolution calls for a public hall for auditorium and exposition purposes. The "exposition purposes" may be only an incidental use to which the auditorium may be put. Granted that the city has the right to erect and construct an auditorium, its right to control and use this auditorium, after it has been erected, for all lawful purposes may not be restricted. It seems from the record that the proposed auditorium will not occupy to exceed sixty-five per cent. of the space afforded by the contemplated structure. To say the city may not utilize this space for purely municipal purposes, such as additional offices or rooms for the accommodation of public business, because such purpose is not clearly expressed in the title of the resolution, is asking a construction to which the court can not accede. Incidental to the use of an auditorium is the necessity for providing suitable lobbies and such ante-rooms as the nature of

the auditorium may require. In a city of a million people public questions frequently arise the decision of which may be of momentous importance to the people. Investigations are frequently had, and more than one investigation may be carried on at the same time. In such event we see no reason why provision should not be made for such investigations and for the accommodation of a large number of the public who may desire to be present on such occasions. Besides, it must be said that, so far as the record shows, it is wholly speculative and problematical at this time just what kind of a design or plan will be eventually adopted for this building. The most that can be said is that the plans and designs now under consideration are merely preliminary or tentative. The question is not really before the court. In the petition filed by the director of law there are claims that the mayor intended to use the building or portions of it for shows, concerts, theatrical performances, and lectures to be given for profit by private persons, and this was to be done for revenue purposes, the city to be responsible for any and all loss due to maintenance. In the petition now before the court this threatened use of the building is more explicitly alleged and at greater length and in greater detail; in fact, the claim is that it is proposed to have the city go into the business of providing, in this building, a number of lecture and concert halls, and perhaps theaters, which are to be rented out to private individuals; in other words, that, so far as the renting of halls is concerned for such purpose, the city is to become a competitor with the owners of similar enterprises or halls.

If this is true, it will be in contravention of the clearly expressed functions of municipal government, and would, we think, fall squarely within the doctrine of *State, ex rel, v. Lynch*, 88 O. S., 71, where it is held that a municipality has no authority, under the powers of local self-government, to establish and maintain a moving picture theater. To establish and maintain a moving picture theater is purely a private enterprise, and is no part of the functions of government; and to construct, erect and maintain a number of halls to be rented or leased for theatrical and concert purposes, lodge rooms, and

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purposes of a similar character, would be engaging in private competitive business. However, the allegations of the petition in this respect are purely anticipatory, if not speculative. The mayor has no authority to plan, design and erect this building to suit his own conceptions of what such a building should be. Assuming that the administrative function of government includes all municipal action not included in the legislative and judicial departments, it can not be said that the plan, design, location and character of the building is an administrative function. The people most assuredly have a right to say just how the money they voted shall be expended, and this right they express through the council. Section 177 of the charter of the city of Cleveland reads as follows:

“There shall be a city plan commission to be appointed by the mayor, with power to control, in the manner provided by ordinance, the design and location of works of art which are or may become the property of the city; the plan, design and location of public buildings, harbors and bridges, viaducts and street fixtures, and other structures and appurtenances; or relocation or alteration of any such works belonging to the city; or location, extension and platting of streets, parks and other public places, and of new areas; and the preparation of plans for the future physical development and improvement of the city.”

Can it be said that the city plan commission may locate new streets, provide for parks, relocate and alter public works, and build harbors, bridges, viaducts and public buildings, of its own volition and without express authority from the city council? Such a contention would be absurd.

It will be noticed that by this section the city plan commission has “power to control, in the manner provided by ordinance, the design and location of public buildings.” Objection is made by the plaintiff in this case and in the brief filed by Mr. Van Svarc, one of counsel for relator, in cause No. 148749, that the resolution of council was defective because it does not disclose the site or location of the proposed auditorium; and it was gravely and solemnly asseverated that for aught that appears in the resolution the auditorium may be located outside of the corporate limits of the city of Cleveland. And it was also asserted

that the phrase "public hall for auditorium and exposition purposes" does not sufficiently express the intention of the council.

The framers of the resolution of February 28, 1916, evidently knew that the charter provided for further legislation in which the plan, design and location of the auditorium would be provided for. Section 177 of the charter was carefully drawn, the city reserving the right, through its representatives, to say where its public buildings and public works shall be located, and how they may be designed and constructed. While the city plan commission has power to control the plan and design of a public building, it is not given power to make or design or draw the plan to suit its pleasure, and therefore the plan and design must be drawn in the manner provided by ordinance. No one will contend that the mayor or the city plan commission can locate a bridge, harbor or building irrespective of the demands of the people or the wishes of the city. Neither can the mayor or the city plan commission finally and absolutely determine the character of such constructions or improvements. The mayor and the plan commission may advise, and, through the city architect, prepare and submit plans and designs for public improvements, but such plans and designs must be approved by ordinance before the city plan commission can assume control and authority over them, and then the control and authority must be exercised in accordance with the terms of the ordinance.

Section 177 *et seq.* of the city charter, which are really declaratory of Section 3677, General Code, provide how property for locations of public works may be secured; and it must, of course, be done by declaratory ordinance and condemnation.

So that it seems these objections can not be considered at this time. When the city undertakes to pass an ordinance specifically defining the plan and design of this auditorium, and such plan or design clearly shows a purpose not warranted by law, or beyond the delegated or inherent powers of the city, it may be proper to ask the intervention of a court of equity.

When cause 148749 was before the court of appeals, that court had a right to ignore these allegations of the petition. Even if it was admitted by the demurrer that the mayor proposed to design the contemplated auditorium building for purposes not

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warranted by law, the court of appeals had a right to take into consideration the fact that it was impossible for the mayor to affectuate any such purpose; and, besides, the court had a right to assume the mayor would not undertake to do so, as all public officers are presumed to obey all laws prescribing their duties. Besides, it is so apparent that in the very nature of things the mayor could not locate this building or design its plan to suit his own purposes, that the allegations to this effect in the petition might well be treated as mere surplusage and of no declarative value in a pleading. It must be held that this question was not properly before the court of appeals, and that it is not now properly before this court. If the contingency involved in this contention, aside from location, which we understand has been settled, ever does arise, it can be met by suitable action.

There remains only the question of *res judicata*. Counsel for defendant contend that all the matters and questions raised in the plaintiff's petition, now before the court, were settled and adjudicated in cause 148749.

The term "*res judicata*" literally means "the matter has been decided" (*Schumacher v. Cincinnati*, 68 O. S., 603), the principle being that a cause of action once finally determined between parties by a competent tribunal can not afterwards be litigated between the parties or their privies in a new proceeding. *State v. Judges*, 69 O. S., 372.

It has been held that before it can be said that a matter is *res judicata* four conditions must concur, namely:

- 1st. Identity of the subject-matter.
- 2d. Identity of the cause of action.
- 3d. Identity of persons and parties.
- 4th. Identity in the quality of the persons for or against whom the claim is made.

This is perhaps the settled law in the United States.

By identity of parties is not meant that they should have stood upon the record as plaintiff and defendant, but that that should have been their real attitude upon the issues tried and determined. *Koelsch v. Mixer, Admr.*, 52 O. S., 207.

Under the term "parties" may be included all who are directly interested in the subject-matter, and who had a right to

make defense, control the proceedings, examine and cross-examine, and appeal from the judgment. *Cincinnati v. Wright*, 1 Western Law Bulletin, 387.

The action brought by the director of law, cause 148749, was brought by the city of Cleveland on the relation of W. S. Fitzgerald as director of law. This action was really brought in behalf of every resident tax-payer in the city; and it must be held that the plaintiff in this case was in fact a party plaintiff in that action, in fact, conducted the proceeding, filed a brief in the case, argued it before the court of appeals, and if he had taken the precaution to have himself entered as attorney of record, we believe he might have moved the Supreme Court for certification of record, though the exigencies of the situation do not demand that we so hold.

In the two petitions there is an identity as to the cause of action; and there is an identity in the quality of the persons whose rights were involved in that action.

Columbus v. Schneider, 14 C.C.(N.S.), 312, although perhaps not directly in point, is clearly affirmative of this proposition. It was held in that case that "actions brought by the proper party against a municipality to enjoin the collection of a street improvement assessment, where submitted on the issues and decided against the plaintiff by the upholding of the assessment, amounts to a conclusive adjudication of the validity of the assessment in an action brought by the city against other parties to enforce the collection of assessments against their property for said improvements." See also to the same effect *City of ElRano v. Paving Co.*, 27 L. R. A. (N. S.), 650.

Counsel for defendant, however, claim that every matter which the parties might have litigated in cause 148749 is *res judicata*. We have already indicated and held that neither the director of law in that cause nor the plaintiff in the case now before the court could properly raise the question as to whether the city of Cleveland has the right to engage in the private business of renting halls, as that question was not before the court of appeals, nor is it before this court.

The plaintiff insists that the issues involved in the petition now before the court are not *res judicata*, for the reason that the ac-

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tion instituted by the director of law, known as 148749, was not brought in good faith and was really intended to prevent the plaintiff or other resident tax-payers from bringing such action.

It may be said that a nice sense of ethical propriety, or perhaps a supersensitive sense of the ethical considerations involved, would have suggested to the director of law that the action be begun and prosecuted by the plaintiff, as it was wholly a matter of discretion with the director of law, and we can not say from the record that there was an abuse of this discretion, but must presume that the director, in bringing this action, honestly intended to fully present all the issues which the plaintiff desired to the court.

In view of all that has been said, and for the reason stated in this opinion, the court finds:

1. That the resolution of the city council of March 28, 1916, was duly and regularly passed, and the purpose and object of the resolution was sufficiently stated in the title by the language therein used. The resolution was not such an emergency as is contemplated by the provisions of the Constitution or the provisions of the charter of the city of Cleveland. Ordinances and resolutions, except emergency measures, do not go into effect until forty days after their passage, in order that the people may petition for a referendum thereon. By Section 66 of the charter, ordinances or resolutions passed as emergency measures go into effect at the time indicated in the ordinance or resolution, but they are nevertheless subject to referendum in like manner as other ordinances. As no referendum was applied for on the resolution of February 28, 1916, it must be held that the ordinance is in full force and effect.

2. The city of Cleveland has full legal right and power to build a public hall for auditorium purposes, and to issue bonds for that purpose; and the right to use such auditorium, after the same has been constructed, for any lawful purpose, and derive revenue from such use. But the city has no authority, under the Constitution of Ohio or the statutes of the state or its charter, to issue bonds to be used primarily for a building for exposition purposes; or to so use portions of the auditorium for

lodge rooms, concert halls, show rooms, or theaters as purely private enterprises.

3. That the judgment of this court, in cause 148749, was affirmed by the Court of Appeals of Cuyahoga County in cause 1289, after a full hearing on the merits; that said action was brought and prosecuted in good faith by the director of law of the city of Cleveland; that both courts had full jurisdiction of the parties and the subject-matter thereof; that the parties in said cause were the same as the parties to this action, or were identical in interest; and that all the issues which could properly be presented for hearing and determined in said cause, or might or could have been so properly presented, are presented for hearing and determination here, and were then and there fully and finally determined against the plaintiff here so far as they were properly before said court.

4. The question of the right of the mayor or of the city of Cleveland to construct, build and provide, in the auditorium building, rooms for shows, circuses, theaters, concerts, or lodge rooms, for the purpose primarily of deriving revenue by leasing such rooms to private persons, was not in issue before said court of appeals in cause 1289, and was not passed upon by said court, and is not by its decision *res judicata*.

5. As the city council of the city of Cleveland has not taken any action as to the plan or design of the auditorium building, or determined by ordinance what the design or plan of said auditorium is to be, and such ordinance is essentially necessary before said auditorium can be finally constructed, the allegations of the petition as to its contemplated use are purely anticipatory, speculative and premature, and not before this court for decision or adjudication.

6. In designing and planning the auditorium, the city may lawfully provide rooms other than the auditorium for purely civic and municipal purposes; and when such rooms are not needed for such purposes, the city may derive revenue therefrom by lease or otherwise.

A journal entry will be drawn in accordance with the opinion of the court.

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Irvine, Receiver, v. Johnson.

STATUTORY LIABILITY OF STOCKHOLDERS.

Common Pleas Court of Hamilton County.

ELLSWORTH C. IRVINE, AS RECEIVER, ETC., v. EDGAR M. JOHNSON
AND FREDERICK L. JOHNSON, EXECUTORS, ET AL.

Decided, October Term, 1916.

*Receivers—Limited to Terms of the Judgment in the Original Suit—
Where Appointed for Collection of Statutory Liability from Stock-
holders.*

In a suit by a receiver appointed in an action brought by creditors to recover double statutory liability from stockholders, the receiver is limited by the terms of the judgment in the parent suit, and where the judgment is in part against executors in their representative capacity, a petition seeking to recover from them as individuals is open to demurrer.

F. C. Rector, T. E. Powell, Stewart & Stewart, Lewis N. Gatch and Tedy M. McLaughlin, for plaintiff.

Simeon M. Johnson, contra.

MAY, J.

This is a demurrer to the amended petition filed on March 30, 1916.

At the January, 1916, term of this court I sustained a demurrer of Edgar M. Johnson and Frederick L. Johnson, executors of the estate of Edgar M. Johnson, deceased, to the petition as originally filed for the reason that the petition did not state a cause of action against said executors. In conformity with that ruling plaintiff filed his amended petition in March, 1915, in which he seeks to hold Edgar M. Johnson and Frederick L. Johnson individually, and I am of the opinion that the demurrer filed by these defendants individually should be sustained for the reason that it does not set up a cause of action against them as individuals.

A demurrer searches the whole record, and an examination of the original petition discloses the fact that the plaintiff in this suit was appointed receiver in the case of Marriott, plaintiff, against the Columbus, Sandusky & Hocking Railroad Company

to collect the statutory liability of stockholders as found due and assessed in that action. That original petition also discloses the fact that in that parent suit the estate of Edgar M. Johnson was held liable as a stockholder, and the court in that case ascertained the amount due from such estate and from the defendants, Edgar M. Johnson and Frederick L. Johnson, executors of Edgar M. Johnson, deceased, and there nowhere appears in such petition that Edgar M. Johnson and Frederick L. Johnson held such stocks as individuals; nor was there any finding or decree or judgment against them as individuals.

It is now sought by the plaintiff in the present action to hold Edgar M. Johnson and Frederick L. Johnson individually, upon the theory that where a person contracts as executor, trustee or agent, he may be held individually upon such contract. There is no doubt that this is a correct statement of the law, but it is inapplicable to the present state of facts, for the reason that in the parent suit no effort was made to hold Edgar M. Johnson and Frederick L. Johnson as individuals, but on the contrary the plaintiffs in that suit sought to charge them in their representative capacity as executors. Having elected to do that, they are now estopped, in my opinion, from proceeding against Edgar M. Johnson and Frederick L. Johnson as individuals.

This is settled in the well considered case of *Fleischmann v. Shoemaker*, 2 C. C., 152 at 161, where the court says:

“Having a right then to seek to charge the executors in their representative capacity, and having elected to do so in this case, and having failed to show any right to recover against them as such, is there any principle of law which authorizes the plaintiff to wholly change his ground and ask to recover against the defendants as individuals? We think not.”

The plaintiff contends that unless he is permitted to proceed against Edgar M. Johnson and Frederick L. Johnson individually, all the creditors will suffer in that the full amount to be recovered as statutory liability for their benefit will not be collected. The court has nothing to do with this matter for the reason that in the parent suit the creditors should have elected whether they would proceed against Edgar M. Johnson and Frederick L. Johnson as individuals or in their representative

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capacity. Having elected to do the latter they can not complain now.

Being of the opinion that in a suit by a receiver appointed in an action brought by creditors to recover the double statutory liability against stockholders such receiver is limited by the terms of the judgment in the parent suit; and as it appears from the record in this case that there is no judgment against Edgar M. Johnson and Frederick L. Johnson as individuals, but only in their representative capacity, the amended petition states no cause of action against them as individuals and their demurrer will be sustained.

PROPER FORM FOR SUBMITTING INTERROGATORIES.

Common Pleas Court of Hamilton County.

A. & J. PLAUT V. HANS I. JACOBSON.

Decided, January 31, 1917.

Interrogatories—Must be Submitted in Such Form as to Give Jurors Opportunity for Signing Their Names.

Counsel submitting interrogatories to jury must prepare them in such a way that the jury in answering them will have opportunity of signing their names to such answers, and where counsel refuse to comply with the request of the court to do so, it is not error to refuse to submit such interrogatories.

Matthews & Matthews, for plaintiff.

W. F. North, contra.

MAY, J.

The principal error complained of is the refusal of the court to submit special interrogatories requested by the defendant.

I am of the opinion that there is no merit in this contention for the following reasons:

In the first place, these interrogatories were not submitted in the proper form. Each interrogatory called for a separate answer. The case on trial was one that permitted a three-fourths jury verdict, and necessarily each juror was required to sign the verdict if he concurred in it, and each juror would likewise be

required to sign his name to the answer of each interrogatory. All the interrogatories were on two sheets of paper, and there was not sufficient space for the jurors answering them to sign their names. The court called attention of counsel to this defect, but counsel made no effort to change the form of the interrogatories.

The questions were not such as to call for answers establishing probative facts, and in their nature were merely questions to ascertain the mental processes by which the jury arrived at conclusions of fact. Under the ruling of *R. R. Co. v. Hawkins*, 64 Ohio St., 391, at 397, such questions need not be submitted.

Then again, the defendant was not prejudiced by the refusal to submit the questions prepared by him. The court of its own motion submitted two interrogatories which covered the ultimate facts of the case.

The plaintiffs sued to recover an over-payment to a salesman. The salesman denied over-payment and filed a cross-petition in nature of a counter-claim. The main contention between the parties was as to the agreement between them. The plaintiffs claimed the defendant was employed at \$2,500 per annum and 6% commission on all sales over \$40,000; the defendant contended the salary was \$3,100 per annum and 6% on sales over \$50,000. The court submitted to the jury two questions, asking (1) What was the salary, to which the jury answered \$2,500; (2) What was the commission, to which the jury answered 6% on sales over \$40,000. These two questions covered all the questions submitted by the defendant with the exception of one, viz., what was the amount of sales of uncollectible accounts? Had the questions been in proper form for submission under *R. R. Co. v. Hawkins*, *ubi supra*, it was not error to refuse to submit this, as its answer served only to ascertain the mental processes by which the jury arrived at its verdict for the plaintiffs.

The case, in my opinion, was fairly submitted, and the charge contains no error prejudicial to the defendant. An omission now complained of can not be considered under *R. R. Co. v. Ritter*, 67 Ohio St., 53, especially as the court asked counsel whether they desired him to charge on any additional points.

For these reasons the motion for a new trial is overruled.

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**COUNTIES MAY PAY PART OF SALARY OF COMMON
PLEAS JUDGES.**

Common Pleas Court of Henry County.

STATE, EX REL HESS, v. GEORGE E. RAFFERTY ET AL.*

Decided, June 15, 1916.

*Constitutional Law—Validity of Section 2252, G. C., Providing for
Payment of Additional Salary to Common Pleas Judges.*

The common pleas judges of Ohio are not state officers, but act in a dual capacity, partly for the state and partly for the county in which they are elected, and payment to a judge by the county in which he serves of the amount provided in Section 2252 is not in conflict with any constitutional provision.

*Otto W. Hess, in propria persona.**R. W. Cahill and John W. Winn, for respondents.*

SCOTT, J.

The relator, Otto W. Hess, as a tax-payer, brings this action, seeking to obtain, by decree of this court, a prohibitive, perpetual injunction against the respondents, George E. Rafferty, as auditor, and Frank C. Fisk, as treasurer of said county, restraining said Rafferty, as auditor of said county, from issuing a warrant or warrants for payment of the additional salary of Orville Smith, the resident judge of the court of common pleas of said county, as provided under Section 2252, G. C., of our state, and said Fisk, as such treasurer, from paying any such warrant to said judge. Also restraining said auditor from placing upon the tax duplicates of said county any levy or levies for the purpose of raising revenue to meet such additional salary of said judge, and for any and all proper relief in the premises. The relator in his bill recites in substance that he was born and raised in the county of Henry, Ohio, and that he is

*Affirmed, *State, ex rel Hess, v. Rafferty*, 26 C.C.(N.S.), 408.

now, and has been, during all the times mentioned, a resident and property owner and tax-payer of said county; that on May 16, 1916, he requested the prosecuting attorney of said county, in writing, to institute a suit for the same purpose for which he brings this action, and that said prosecuting attorney failed, neglected and refused to bring said suit.

That the respondent, George E. Rafferty, is the duly elected, qualified and acting auditor of said county; that the respondent, Frank C. Fisk, is the duly elected, qualified and acting treasurer of said county.

That Orville Smith is the duly appointed, qualified and acting resident judge of the court of common pleas of the state of Ohio, in and for the county of Henry.

That the respondent, George E. Rafferty, as such auditor, will, unless restrained by an order of the court, issue his warrant upon the local treasury of said county, for the payment of the additional salary to said judge, as such acting judge of said court; and the respondent, Frank C. Fisk, as such treasurer, will, unless restrained by an order of this court, pay said warrant out of the funds of said county, raised by local taxation upon the tax-payers of said county; and the respondent, Rafferty, as such auditor, will, unless restrained by an order of this court, levy a tax upon the tax-payers of said county for the purpose of creating a fund to pay such additional salary to such common pleas judge, and his successor or successors in office.

The relator then copies in his bill Section 2252, G. C., and shows that this quoted section of the code is the particular law which contravenes the state and federal Constitutions.

The bill closes with a prayer for the relief sought.

The respondents answer, admitting that the relator was born and raised in Henry county, Ohio; that he is a resident of said county; that the respondents are the elected, qualified and acting officials, as averred in the bill; that said Orville Smith is the appointed and acting common pleas judge of said county; that the respondent, Rafferty, as such auditor, will, unless re-

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strained, issue his warrant upon the treasury of the county for payment of the alleged additional salary to said judge; that the respondent, Fisk, as such treasurer, will, unless restrained, pay such warrant out of the funds of said county, raised by local taxation upon the tax-payers of the county.

Then follows a general denial of all the allegations of the bill which are not specifically admitted to be true.

These respective pleadings raise the issues of law and fact which the court is now called upon to consider and determine.

The cause was ably and eloquently argued and presented by the learned counsel upon either side, and finally submitted for our exquisite pleasure.

The evidence adduced upon the hearing of the case, tends to establish, fully, the averments of the bill, in so far as they relate to the place of birth of the relator, his residence and his standing as a tax-payer of the county. The evidence, also, shows beyond dispute, that prior to the bringing of the action, the alleged request in writing was, by the relator, served upon the prosecuting attorney of the county, and that said prosecutor refused to bring the suit.

All of the preliminary and necessary steps to enable the relator to institute this suit were taken since the dawning of the present year. He has shown himself fully equipped and qualified to bring and prosecute the "Cause Celebre," and to push it, with all his vigor, from this court to that of the Supreme Court of the nation.

The fact that the relator paid no tax into the county coffers until some time after the action was planted in this court, can have no significance or bearing in determining the real issue in the case, which issue touches and drags into question the constitutionality of the section of the statute referred to.

Our purpose in deciding the true contention herein is to close our eyes and ears to all things that smack of technicalities, and base our decision on the real merits of the controversy.

The people, not only of Henry county, but of the whole state, want to know whether their judges have been drawing salaries for these many years, to which they never were entitled.

Again, the fact that the relator is a small tax-payer, and for the first time in his life paid, since the commencement of this suit, the sum of sixty-six cents into the county treasury, can have no influence upon the court in deciding the salient issue herein.

If the amount of tax paid by relator were the "bone of contention," we would feel like avoiding a decision of the case by re-paying to him the sum expended in making preparation to bring the suit. We know however, that, no matter how dearly we might wish to avoid our duty, and its performance, yet we can not escape our labor in any way other than by a strict performance of the obligation laid upon us by an assignment made by the chief justice of the Supreme Court of the state.

It is astounding, however, to know that the relator is the only citizen, out of several million in the state, who has exhibited the nerve and courage to lay aside the busy affairs of life long enough to have this great question relating to the constitutionality of the law in dispute settled.

The action is planted in a court of equity, and the relief sought is that of injunction.

The burden in the case rests upon the relator. The court will grant a perpetual injunction only when a party, seeking such injunction, shows a clear right thereto.

The power to grant writs of injunction is one of the extraordinary powers of a court of equity and should only be exercised in cases where a great and important public question, affecting the rights of a citizen, is at stake, and to prevent injuries which would otherwise be irreparable, or when the magnitude of the injury to be dreaded is so great, and the risk so imminent, that no prudent person would think of incurring it.

It is illuminating and refreshing to one's mind, at this crucial time, to recall from the silent chambers of the memory, these old, well grounded and recognized principles of the law, which have grown into maxims of equity by usage and lapse of ages.

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The point which rises before our vision now, and which we must decide is: has the relator shown a clear right to have and receive the extraordinary remedy and relief he so ardently and earnestly seeks at the fountain of justice? A fountain, to quaff whose intoxicating contents he has shown himself willing to pay a price that would have purchased the golden goblet of the Egyptian queen.

The relator is here in double trust; first as a citizen and tax-payer of Henry county; secondly, as a young man, wearing the magic mantle of a lawyer, striving, honestly and fearlessly, to protect the Constitution of his state, and that of the republic, against the evil encroachments, brought about by an enactment of the Legislature of the state, giving to common pleas and superior court judges of the commonwealth additional salaries for their services, performed in the interest of public justice.

While it is too true that the point raised by this controversy goes directly to the constitutionality of both state and federal Constitutions, yet we shall confine our efforts to the Constitution of Ohio, and not that of the nation, for, we fancy, our legal journey will afford us ample mental recreation if ended at the exit of our state Constitution.

We shall leave the determination of the question affecting the federal Constitution to the federal courts, where it properly rests, and take consolation in so doing in the sweet words of solace found in St. Matthew, 6-34: "Take therefore no thought for the morrow; for the morrow shall take thought for the things of itself. Sufficient unto the day is the evil thereof."

We have grave doubts in our mind at this time whether this suit is actually brought by "the real party in interest," and in good faith, or for a selfish purpose. And while there is, perhaps, nothing apparent upon the surface of the record indicating a want of good faith, yet we fancy we can hear a strange and mysterious sound, "like the rustle of an invisible wing," but in fact, a subtle, silent undercurrent, which will, ere long, burst forth in its true character, to show the people of the

good county of Henry, and the state, the real policy and purpose for which this action was instituted in this court. All doubts, for the sake of the public good, will be, by us, resolved in favor of the relator.

This is not the first attack that has been made upon the courts of the state. We shall label it as the second, and its base and source may well be traced to the spot where the first attack emanated. To find the "spot," you need not go beyond the limits of Henry county. It must not be forgotten that, "In the corrupted currents of this world offense's gilded hand may shove by justice; and oft, 'tis seen the wicked prize itself buys out the law."

Approaching now the legal phase of this controversy, we take up a consideration of some of the sections of the state Constitution, the statutes connected with the subject involved, and decisions of certain of the courts.

Article IV, Section 1 of the Constitution, as amended by the voice of the people, in 1912 makes provision that:

"The judicial power of the state is vested in a Supreme Court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of Appeals as may be, from time to time, established by law."

Article IV, Section 3 of the new Constitution provides, in substance, that in each county of the state there shall be one resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law. They shall be elected in each county by the electors of the county. Further provision is made by this section, that any judge of the court of common pleas may temporarily hold court in any other county, and until otherwise provided by law, the chief justice of the Supreme Court is given power to make assignments of judges to hold court in any county of the state. Subsequently to the adoption of the new Constitution, the Legislature, by its act, following the dictates of the new Constitution, vesting the power to assign judges to other counties than those of their resi-

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dence, left the vested power in that regard where it was placed by the people when they adopted the new Constitution—in the chief justice.

Prior to the adoption of our present Constitution, the state was divided into nine judicial common pleas districts, and such districts were carved into numerous subdivisions.

Article IV, Section 7 of the new Constitution, makes provision for one probate court in each county in the state, the judge thereof to be elected by the electors of the county, and to hold his term of office for four years. This section also provides for the consolidation of the two courts, and fixes the method thereof.

No such step can be taken, however, in such matter of consolidation in counties having 60,000 and more population.

If the majority of the electors in any county wherein an election may be held to consolidate the two courts vote in favor thereof, then the said courts become combined. The same act provides for the legal machinery and necessary equipment to run both courts after combination is once had.

Section 12 of the new Constitution provides that the judges of the courts of common pleas shall reside in the county for which they are elected, and their term of office shall be six years.

This provision as to the residence of common pleas judges was not incorporated in the old Constitution, but such judges were required to reside in some county of their district.

Section 15 of the new Constitution provides that laws may be enacted by the General Assembly increasing the number of judges of the Supreme Court, and increase beyond one, or diminish to one, the number of judges of the court of common pleas of any county of the state.

Section 1532, G. C., as amended, recites:

“There shall be a court of common pleas in each county of the state, held by one or more judges, residing therein and elected by the electors thereof. Each judge shall hold office for six years, and his successor shall be elected at the election in even numbered years next preceding the expiration of his term. Each judge heretofore elected as a judge of common pleas dis-

trict shall, after the year 1914, serve as a judge of the common pleas court of the county of which he was a resident at the time of his election."

Section 2252, G. C., being the section as modified, fixes the additional salary of judges of the courts of common pleas of the state, and in so far as the same is applicable to the questions involved in this case, recites:

"In addition to the salary allowed by the preceding section, each judge of the court of common pleas and of the superior court shall receive an annual salary equal to \$25, for each one thousand population of the county in which he resided when elected or appointed, as ascertained by the federal census next preceding his assuming the duties of such office. In no case shall such additional salary be more than three thousand dollars.

"Such additional salary shall be paid quarterly from the treasury of the county upon the warrant of the county auditor. If the judge resides in a county which comprises a judicial subdivision, such additional salary shall be paid quarterly from the treasury of the county in which he resides; and if he resides in a county which is a part only of a judicial subdivision such additional salary shall be paid quarterly from the treasuries of the several counties of the subdivision, in proportion to the population thereof upon the warrants of the auditors of such counties."

Under this section of the code, prior to its modification, the additional salary of judges was \$16 for each thousand of the population of the county in which the judge resided at the time of his appointment or election, in no case more than \$3,000 nor less than \$1,000, and was payable out of the treasuries of the counties of the subdivision, in proportion to their population. The relator relies, with supreme confidence, to support his contention, upon the case, *State v. Kreighbaum*, 9 C. C., 619. This case involved the constitutionality of Section 3085, R. S., relating to the construction of armories in this state.

The Circuit Court of Putnam County had the same question under consideration in *State v. Brinkman*, 7 C. C., 165.

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The court held the law unconstitutional in each of these cases on the ground that the national guard is a state institution, and, inasmuch as county commissioners can only levy taxes for local purposes, therefore, it follows that the commissioners of a county have no power or authority to burden the people of the county with taxes to support a state institution.

There can be no question about the correctness of this doctrine. Clearly, the national guard, or state militia, is a state institution, and under the so-called "Dick Act," passed by the Congress, the state militia is now part of the "Standing Army," and as such is yet liable to do service in our neighboring republic.

That able jurist, Judge Jenner, in the Stark county case, seems to have delivered an "obiter dictum," wherein he had much to say about the meager salaries of judges—at that time circuit court judges drew \$4,000 a year for their services.

We are inclined to agree with the learned judge, in so far as the "obiter dictum" goes, but "dissent" as to all other questions determined by him in the case, *supra*.

We commend Judge Jenner, when he says, "The great state of Ohio is certainly able to pay her judicial officers a fair compensation for their services without calling upon any county to bear more than its ratable share of the burden."

Let it be remembered that the Constitution of our state nowhere attempts to fix the salary of any judge of the court of common pleas, nor does it anywhere provide the source from which such salary shall be paid.

All this is left to the wise discretion of the Legislature.

Just what particular sections of the Constitution are encroached upon by the law giving the common pleas judges an additional salary, we are not advised, as we do not have the benefit of the brief of relator, but take it that he means to point out Article X, Section 7. This article and section relate to the powers of county commissioners in levying taxes for local purposes.

It seems to us that the whole question involved in this controversy hinges upon the fact as to whether or not common

strict shall, after the year 1911, be a court of the county of his election."

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That one Orville Smith is appointed, qualified and acting resident judge of the county of Henry in said state. Never before, in our brief career, did it dawn upon our dull intellect that a "state officer" may be elected by the electors of only one of the eighty-eight counties in the state. If this is true, then why not do away with the election machinery of eighty-seven counties and elect our Governor, Auditor of State, Secretary of State, Attorney-General, State Treasurer, and the Chief Justice and his associates, by a vote of the electors of one county. Such policy would save unto the tax-payers, including the relator, countless thousands each year.

If this catastrophe were to happen, however, the occupation of the politician would fall into the same predicament as that of the "Black Othello" gone.

It is hotly contended by relator in his eloquent oral argument, that forsooth, because common pleas judges may be assigned by the Chief Justice to hold court in counties outside of those in which they reside, this power, so delegated by the Constitution and the law, makes such common pleas judges state officers. That is to say, because their duties, when called upon, take them to all counties of the state, it follows, therefore, that they are state officers. There may be much "method in this madness," but, surely, not much law.

Again, it is contended by relator that because common pleas judges are "constitutional officers," then it follows, they are state officers. This contention is founded upon the deepest fallacy. The clerks of the courts of common pleas of the state are "constitutional officers," but it does not follow they are "state officers."

Probate judges are "constitutional officers," elected in the same manner as common pleas judges, their terms of office and tenure, however, being four years instead of six.

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Every sheriff of every county in the state is a "constitutional officer." Sheriffs have the power to search every nook and corner of the state for criminals, and to apprehend them wherever and whenever found within the confines of the state; aye, they may even pursue a fugitive of justice into any state of the Union, if armed with a requisition, and, as agent of the state only, arrest and bring back the escaped criminal. Ergo a sheriff is not only a stateless officer, but also a United States officer(!).

All this is the finest quality of "Crown's quest" law, but it does not savor of the spirit or letter of sound statute law.

In *State v. Kreighbaum*, *supra*, the court proceeded first to show that an armory is purely a state institution, and there can be no dispute as to this contention, and then the court calls attention to Article X, Section 7 of the Constitution, which provides that county boards of commissioners and trustees of townships shall have power of local taxation for police purposes as prescribed by law. The court then called attention to the case of *Wasson v. Commissioners of Wayne Co.*, 49 Ohio St., 622, and to the language following:

"The character and purpose of a law, not less than its constitutionality, are to be determined by its operation and effect. If, in effect, its purpose is one that concerns, and its benefits are to be bestowed upon the people of the entire state, or the people of a particular class in the entire state, as we have already found to be true of the act in question, then it is a law general in its character, and if it seeks to impose taxation for the carrying out of those purposes, it would seem to follow that such taxes are state taxes."

The point determined by the Supreme Court in this case is that the commissioners of a county may not levy taxes for a purpose in which all the people of the state have a common concern.

Taxes levied to raise revenue for the purpose of paying the salaries of the Governor and other state officers can well be said to be for the common benefit of all of the citizens of the state,

for that every citizen of the commonwealth is equally interested.

We are unable to conceive how these "armory cases," cited by the relator, can have any possible bearing upon the question of constitutionality of the statute before us, and which statute, it is claimed, contravenes Article X, Section 7 of the Constitution, or possibly, every other article and section of the Constitution of the state. Before the change in the armory law took place, armories of the state were built and equipped for the use of a state institution—the state militia, or National Guard.

We have no doubt but that the State Capitol Building, whose beautiful dome points toward the passing clouds, was built and paid for by state funds, and this must be true because it belongs to all of the people of the state, and not to those of any particular county, but how is it as to court houses that dot the fair face of Ohio, the greatest, best and noblest of all the states? Court houses are built for each particular county, equipped for the use of the courts of the county, paid for by money arising from taxation, imposed and levied upon the citizens of the county, and are the property of the people of the county.

While we have indicated that a solution of the question involved in this controversy depends upon the fact as to whether common pleas judges are state officers, yet we are persuaded that the relator should fail, even in that event; we believe that a judge may act in a dual capacity, partly for the state and partly for the county in which he was elected.

Relator in his oral argument called our attention to some case decided by some court in the state of Tennessee, but he was unable to give us a correct reference to the case. We think this case was considered in the case of *In re Salary of Superior Court Judges*, 82 Wash., 623, which we shall consider ere we close.

The very question involved in the instant case was exhaustively considered by the Supreme Court of Washington. In discussing this case it is fit to make a comparison of those parts of the Constitution of our state and that of the state of Washington touching the judicial powers of these states, and note

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that the two Constitutions in that regard are, indeed, very similar.

The judicial power of the state of Washington is vested in the Supreme Court and superior courts, and such inferior courts as may be, from time to time, created by the Legislature. The jurisdiction of the superior courts of that state is substantially the same as that of our common pleas courts. Article IV, Section 13 of the Constitution of Washington, provides that such judges shall receive salaries as prescribed by law, one half of which shall be paid by the state and the other half by the county. Section 13 fixes such salary at \$3,000 each year. The Constitution also provides that the Legislature may increase such salaries, and Section 9052 of the code of the state authorizes the board of county commissioners to increase such salary to a maximum of not more than \$4,000. In this case five points were raised for determination by the court, and we shall deal with the first and third, as the others have no application here.

Fullerton, J., in deciding the first point raised, used these words:

“The first contention, however, is that the superior courts are state courts, the judges thereof state officers, and hence, a statute which purports to authorize the counties to make appropriations for the salary of the judges, is a statute authorizing appropriations for the state rather than for county purposes, and is prohibited by Section 12 of Article II of the Constitution, before cited. But we think that the claim that the superior courts are state courts, and the judges thereof state officers, does not correctly define the position these courts and officers bear to the several counties, and to the state. Unquestionably, since these courts have and exercise superior and general jurisdiction over all the principal matters in controversy arising between citizens of the state, and between the state and individuals charged with violating the state laws, they perform state functions, and to that extent are state courts, and the judges state officers; but it is as equally true that they perform county functions as well.

“From an examination of the recitals we have made from the section of the Constitution defining the jurisdiction of the su-

perior courts, it will be observed that they have been granted all the jurisdiction that pertained to the county courts, existing at the time of the adopting of the Constitution, and much of the jurisdiction then pertaining to the courts of the justices of the peace. *Nowhere* in the Constitution are they denominated state courts, and it is worthy of note that the framers of that instrument were careful to say that the 'process' of such courts, not their 'jurisdiction,' shall extend to all parts of the state. Again, the judges of the superior courts are not elected by the state at large, as state officers generally are elected, but by the counties in which the courts are holden and over which they preside; and the judges so elected are permitted to sit in other superior courts only at the request of the regularly elected judge thereof or at the request of the Governor.

"The sources from which the judges' salaries are paid, and the source from which the equipment necessary to an exercise of their functions is furnished, we think lends color to the claim that the framers of the Constitution did not regard the judges of the superior courts to be strictly state officers. Their salaries as fixed by the Constitution, or as it may be fixed by the Legislature, are to be paid, one-half by the county for which they are elected and one-half by the state, and their equipment, such as the places for holding courts, the clerks, bailiffs, and other assistants are furnished wholly by the counties. On the other hand, state officers who are clearly such by the terms of the Constitution are paid wholly by the state, and their equipment necessary to the exercise of the functions furnished wholly by it. It seems, therefore, clear to us that the superior courts and the judges thereof occupy a somewhat dual position; that they perform both state and county functions, and serve both state and county purposes, and hence are officers for whose support the county may make appropriations from county funds."

Speaking of the third point raised in the case, *supra*, Fullerton, J., recites:

"But it is said that the question of the amount of the salaries of the judges is so remotely connected with any real purpose of the county, it is an abuse of the power conferred by this provision to the Constitution to authorize the county to make, or the county to pay, from its funds, an increase of salary of judges over that fixed by the general laws. This, however, is an administrative or legislative, rather than a judicial question.

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“It may be that courts would interfere in a case where it was made to appear that there had been a gross abuse of the power, such, for example, as in a case where the court can clearly see that there can be no possible benefit derived by the county from the expenditure; but we can not think this is such a case. The salaries of the judges must be in a measure commensurate with the earning power of the average lawyer engaged in the profession, else men of capacity will not accept the office of judge.

“An increase of the salaries, therefore, tends to an increase of the efficiency in the administration of the laws, and the act can be justified on these grounds.”

The cogency and force of the reasoning of the judge in the case, *supra*, are admirable, and we fail to comprehend how any impartial judge or lawyer can close his eyes to the potency and propriety of the argument.

While the relator, in oral argument, said nothing about the question of uniformity of the act whose constitutionality is challenged, yet we have no doubt that somewhere and sometime along the pathway of this legal controversy, some court will hear this point presented, and endeavoring to cover every possible question that may be raised, and not intending to shirk our duty, or its performance, we call attention to the case of *State v. Yates*, 66 Ohio St., 546.

In this case the Supreme Court held “That the uniformity of compensation which is required is not uniformity in the total amount received, but uniformity in the rate of compensation.”

The statute in question does apply uniformly to all common pleas and superior court judges, and the salary of each is determined by a uniform rule, although the amount arrived at is not necessarily always the same.

In the light of the similarity of the Constitution of our state and that of Washington state, and the fact that all of the judges of that state concurred in the opinion of Fullerton, J., we are led to the inevitable conclusion that the case, *supra*, is absolutely decisive of the instant case.

With an abiding faith in the justness and righteousness of our convictions and the absolute accuracy of our conclusions,

we refuse the relief prayed for by the relator, and cast our destiny upon the altar of justice there to "stand the hazard of the die."

Entertaining the views herein expressed, our conclusion is, and we so hold, that common pleas and superior court judges of this state are not state officers; that they act in a dual capacity, partly for the state and partly for the county in which they are elected.

That Section 2252, G. C., is not in conflict with Article X, Section 7 of the Constitution, or any other section or article of that instrument.

Injunction refused. Petition dismissed.

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**PROCEEDINGS FOR REVERSAL OF AN ORDER APPOINTING AN
ADMINISTRATRIX DE BONIS NON.**

Common Pleas Court of Hamilton County.

LOUISA A. GARTNER, EXECUTRIX, v. ANNA M. MEYER,
ADMINISTRATRIX DE BONIS NON, ETC.

Decided, January 13, 1917.

*Estates of Decedents—Rights of Executrix of Deceased Administrator
—Not Affected by Appointment of an Administrator de bonis non
—Exclusive Jurisdiction of Probate Court in Appointment of Ad-
ministratrix de bonis non.*

1. No substantial right of an executrix of a deceased administrator is affected by an order of the probate court appointing an administratrix *de bonis non* for the estate of which said decedent was administrator, and therefore such executrix is not entitled, under the statute, to prosecute proceedings in error to reverse said order of the probate court.
2. The jurisdiction of the probate court in the matter of appointing an administratrix *de bonis non* is exclusive, and error will not lie to reverse an order of the probate court appointing such administratrix where the record does not show that the probate court, without sufficient cause, denied the right of appointment to some one who by statute is entitled to preference in appointment.

*Hicks & Hicks and James R. Jordan, for plaintiff in error.
Spangenberg & Spangenberg and Gardner & Freking, contra.*

GEOGHEGAN, J.

This is a proceeding in error to reverse a judgment of the probate court appointing the defendant in error as administratrix *de bonis non* of the estate of Joseph C. Meyer, deceased. The plaintiff in error is the executrix of the last will and testament of Joseph F. Meyer, deceased. Joseph F. Meyer was the son of the said Joseph C. Meyer and the said Anna M. Meyer, who was appointed administratrix *de bonis non* of the estate of the said Joseph C. Meyer. The plaintiff in error, as such executrix,

brings this proceeding in error to reverse the judgment of the probate court appointing the said Anna M. Meyer as said administratrix *de bonis non*.

When the case came on to be heard a motion was filed by the said Anna M. Meyer, administratrix *de bonis non*, to dismiss these proceedings in error for two reasons; first, because the jurisdiction of the probate court in the matter of appointing administrators and executors is exclusive, and error will not lie to reverse the action of that court in appointing the said administratrix *de bonis non*; and second, because no substantial right of the present plaintiff in error as executrix of the estate of Joseph F. Meyer, deceased, has been affected by the order of the probate court in appointing said administratrix *de bonis non*.

I am of the opinion that this motion is well taken. Section 10492, General Code, in so far as it applies to the matters herein in controversy, is as follows:

“Except as hereinafter provided, the probate court shall have exclusive jurisdiction; * * *

“2. To grant and revoke letters testamentary and of administration.”

In construing this statute the Circuit Court of Lucas County, in the case of *Stafford, Excr., v. American Missionary Association*, 22 C. C., 399, at page 402, say:

“Section 524 of the Revised Statutes of Ohio provides:

“ ‘The probate court shall have exclusive jurisdiction except as hereinafter provided * * * to grant and revoke letters testamentary and of administration.’

“It is contended on behalf of the defendants in error that this means exclusive and final jurisdiction, not simply exclusive, original jurisdiction, but exclusive jurisdiction in the strict sense of the terms; that no other court shall have jurisdiction over the matter, either original or by way of appeal or a proceeding in error, unless other provisions therefor shall be found in the statutes; and the court of common pleas took this view of the statute, and we are of the opinion that that is a proper interpretation of the statute.”

That decision was rendered in the January term, 1902.

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This decision would seem to dispose of the question involved in this motion, unless, as is stated in the opinion of the court, there are other provisions to be found in the statutes whereby the right to review an order of the probate court in granting or revoking letters testamentary and of administration is expressly granted. Now the section giving the right to prosecute a proceeding in error to the probate court is found among the provisions of Section 12241 of the General Code, which reads as follows:

“An order made by a probate court removing or refusing to remove an executor, administrator, guardian, assignee, trustee or other officer appointed by a probate court, and a judgment rendered or final order made by a probate court, insolvency court, justice of the peace or any other tribunal, board, or officer, exercising judicial functions, and inferior to the court of common pleas, may be reversed, vacated, or modified by the common pleas court.”

This statute was originally passed in 1853 as Section 512 of the Code of Civil Procedure, and is found in 51 O. L., page 145. At that time and for a long time subsequent to its passage the said section did not have in it the language:

“An order made by a probate court removing or refusing to remove an executor, administrator, guardian, assignee, trustee or other officer appointed by the probate court,”

and in the January term, 1900, in the case of *Monger v. Jeffries*, 62 Ohio St., 149, the Supreme Court of Ohio held that—

“An order of the probate court removing an executor is not the subject of review on petition in error in the court of common pleas.”

Evidently, in order to avoid the effect of that decision and to make such an order as was spoken of in that case reviewable, the Legislature on May 6, 1902, amended said original Section 512, then known as Section 6708 of the Revised Statutes, by placing in it the language heretofore quoted. It therefore is obvious that the Legislature, as a direct result of a decision in *Monger v.*

Jeffries, intended to provide a means of review to persons who were aggrieved by the action of a probate court in either removing or refusing to remove an executor or administrator, and if the Legislature intended to provide for a review from an order of the probate court appointing an administrator it would have said so in so many words. The right to have a review of a final order of the probate court has existed since 1853, but up to the passage of the amendment to Section 512 of the Code of Civil Procedure, as set forth above, the order of the probate court in appointing or removing or refusing to remove an administrator could not be considered a final order, because, certainly, if the order of a probate court in removing an administrator or refusing to remove one could not be considered a final order, the order of the probate court in appointing an administrator where no question is made that the person appointed is not one of the classes of persons entitled to preference in appointment under the statute, must by a parity of reasoning be held not to be a final order.

Now in this case, the person appointed is the living next of kin of the decedent. She is his widow, and his only other next of kin left surviving him was his son, who was the administrator originally appointed and who is now dead and whose executrix is now prosecuting this proceeding in error. Therefore, the mere appointment of this administratrix *de bonis non* by the probate court is not reviewable unless connected with circumstances showing a denial without sufficient cause of the right of appointment, existing in some one who by statute is entitled to preference in appointment.

There is a good reason for holding that an order by a probate court appointing an administrator is ordinarily not reviewable. The probate court has a wide discretion in the matter of the estate of deceased persons. The administrator not only represents the estate, but is also an officer of the court, and while it is true that the statute imposes upon the probate court the duty of appointing persons named by the statute as entitled to appointment, this is not an absolute duty, but rests in the sound discretion of that court; and if that court finds that the person

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entitled to appointment is not a fit and suitable person, it is not only the right, but the duty, of the probate court to appoint some proper and suitable person to act as administrator.

This proposition is clearly established in the case of *Miller v. Miller*, 19 C.C.(N.S.), 243, wherein it was held that—

“An order by the probate court appointing as administrator of the estate of a decedent a person other than the one named in the will is not subject to review by appeal, where there is a finding by the probate court that the applicant for appointment designated in the will is not a suitable person to administer the estate,”

and the court in discussing therein the provisions of Section 10859, General Code, providing when appeals may be taken to the common pleas from an order, etc., of the probate court, definitely points out that the section is limited to proceedings affecting orders of distribution and can not be made to apply to orders affecting original appointment of executors and administrators where the discretion of the original court is involved.

Now I take it that there is no substantial distinction between appeal and error in matters of this kind. Practically they are the same, their only difference being a mere matter of procedure, the ultimate purpose of either being to obtain a review of the action of the lower court; nor is the order of appointment herein a final order as contemplated by the code. A final order is defined by Section 12258 of the General Code as follows:

“An order affecting a substantial right in an action, when in effect it determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed as provided in this title.”

Now the question naturally arises, how is any substantial right of the plaintiff in error affected by this order of the probate court appointing the administratrix *de bonis non*. The plaintiff in error is merely executrix of the deceased administrator. She has no right to interfere with or to carry on the

administration of the estate of which her decedent was administrator; therefore, this proceeding affects no substantial right accruing to her in her fiduciary capacity.

It is a fundamental rule too well known to need citation of authorities, that a person who seeks reversal or modification of a judgment or order must be one whose substantial rights are affected thereby, and I can not see by what process of reasoning an executrix of a deceased administrator is affected in her substantial rights by the appointment of an administratrix *de bonis non* for the purpose of winding up an estate which the deceased administrator failed to wind up. If the executrix has any defense to any claim that might be asserted against her decedent as administrator, that is a matter which should be determined when the claim is presented, but can not be made the basis of a contention by the executrix that the appointment of the administratrix *de bonis non* might affect some substantial right of hers.

I have examined the cases cited by counsel for the defendant in error upon this motion and they can be disposed of as in no way affecting the ruling herein. In *Todhunter v. Stewart*, 39 Ohio St., 181, the court appointed an administrator without giving the next of kin an opportunity to apply for appointment. The probate court *refused the application of the next of kin* to have one of their number appointed, and the Supreme Court simply held in that case that the action of the probate court was erroneous in its refusal to remove the administrator it had appointed and appoint the person whom the next of kin had designated. The report of that case does not disclose that any question was made at any time as to the right of the contesting parties to prosecute error, but I am free to admit that irrespective of the making of that question, the order denying the next of kin their right to appointment without setting forth the reasons therefor, showing that the court was denying it in the exercise of his proper discretion would be an order affecting a substantial right.

In the case of *Schumacher v. McCallip et al*, 69 Ohio St., 500, the Supreme Court simply followed the ruling in *Todhunter v.*

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Stewart, supra, and held that under the authority of that case an order of a probate court denying the right of administration which the statute confers upon the next of kin is reviewable. In the case, also, there was a *refusal to appoint* the next of kin on the ground of unsuitability. And in *Hare v. Sears, Guardian*, 4 N.P.(N.S.), 566, the Common Pleas Court of Wyandotte County entertained a proceeding in error in a case where the probate court appointed a stranger as guardian of a minor child over the protest and objection of its father, the court holding that the father, having a natural right to the care and custody of his child, an order denying him that right was one affecting a substantial right which might be reviewable on error. The final order in that case was the denial of the application of the father to be appointed.

As pointed out here, even though one were to concede that an order of the probate court appointing an administrator *de bonis non* under such circumstances as herein disclosed is reviewable on error, certainly such an order does not affect the substantial rights of the executrix of the deceased administrator, and therefore she can have no right to prosecute error proceedings.

I am, therefore, of the opinion that the motion to dismiss the petition in error should be granted, and an order will be made accordingly.

Having come to this conclusion it becomes unnecessary to discuss the propositions cited by counsel with reference to the merits of this controversy.

**ASSESSMENT OF PLATTED PROPERTY ADJACENT
TO CITY OR TOWN.**

Common Pleas Court of Montgomery County.

WILBUR C. WAMPLER ET AL V. CHARLES W. HAINES ET AL; AND
SAMUEL WAMPLER V. CHARLES W. HAINES ET AL.*

Decided, July 19, 1916.

*Taxation—Assessment of Platted Property—Adjacent to City or Town
—Valuation to be Made by Township Assessor—No Relief There-
from, in the Absence of Fraudulent Discrimination, When Approved
by County Board—Section 5568.*

1. The valuation placed on property by a proper taxing officer or board can not be disturbed in the absence of a showing of fraudulent discrimination or gross inequality, if the assessment has been made in accordance with law.
2. An addition to a city or town, within the meaning of the statute, includes not only land then or thereafter incorporated, but also platted land lying adjacent to the corporate line, or adjacent to platted property contiguous to the corporate line.
3. An assessment of such a platted tract is lawfully made where returned by the township assessor and approved by the county board of equalization, and shows a valuation made in the same manner as new structures are valued, having regard to the next preceding decennial valuation so that the valuations may be equalized as nearly as practicable with those of adjacent lots and lands as made at the preceding decennial valuation.

Gottschall & Turner, for plaintiff.

Clement R. Gilmore, Assistant Prosecuting Attorney, contra.

SNEDIKER, J.

The two cases which the court is about to decide on their merits have been pending for a long time. General demurrers were filed to the petitions. These demurrers were presented to the court.

*Affirmed by the Court of Appeals, January 16, 1917.

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As we understand the ruling of the court on these demurrers, it was that the objections that these petitions do not show upon their face that a reference had been made to the annual county board of equalization of Montgomery county, Ohio, of the complaint presented, and that upon such reference the board had rejected the applications of the plaintiffs to have the appraisement of their property reduced, and this rendered these petitions defective.

Upon the sustaining of these demurrers plaintiffs filed in each case an amendment and supplement to the petition, setting up that the assessor in making the increase in valuation had no regard to the next preceding decennial valuation, and that they had filed complaint and made applications for reduction to the annual county board of equalization, and that upon a hearing such applications were rejected, and plaintiffs were denied relief.

Subsequently an answer was filed by the defendants which constitutes, in effect, a general denial of the averments of the petition and of the amendment and supplement to the petition.

Within the last week these cases were submitted to this branch of the court and we now proceed to determine the matters in controversy.

Taking up first the averments of the amendment and supplement to the petition, and the facts found in the agreed statements of fact intended to support the same, and particularly that part of the averments of the amendment and supplement to the petition which relates to the failure of the assessor to have regard to the next preceding valuation of the tracts involved, we feel bound by the Ohio authorities and by the authorities of other states relating to the right of a court to review the finding of a board of equalization in that regard and in regard to their finding as to the equality of such appraisal.

These are quoted quite liberally in the brief of counsel for the defendants. From *Cooley on Taxation* this extract is given:

“The courts, either of common law or of equity, are powerless to give relief against the erroneous judgment of assessing bodies, except as they may be specially empowered by law

to do so. This principle is applicable to statutory boards of equalization, which are only assessing boards with certain appellate powers, but whose action, if they keep within their jurisdiction, is conclusive, except as otherwise provided by law, although if fraud is charged there may be a remedy in equity."

In *Wagoner v. Loomis*, 37 O. S., 571, the principle as laid down is as follows:

"As a general rule the decisions of officers and tribunals specially created and charged, in the tax laws, with the duty of valuing property for taxation and equalizing such valuations, are final and conclusive.

"Inequalities in the valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of fraudulent discriminations by the agents and officers charged by the law with the duty of making such valuations."

In the case of *Hagerty v. Huddleson et al*, 60 O. S., 149, the language of Judge Burket in the opinion is as follows:

"The valuation placed upon property by a taxing officer or board within the scope of authority conferred by law, when made in good faith, will be held and regarded by courts as conclusive of the value unless it should appear that there was some gross mistake to the prejudice of the tax-payer."

Other authorities cited in the brief of counsel for defendant are cases in 10 Cal. App., 185; 124 Ill., 666; 173 Ind., 776; 77 Kas., 349; 52 Mo., 456.

A consideration of these authorities leads us to the view that with the action of the board, if the assessment was made according to law by the assessor, we must be satisfied, unless there be fraud, fraudulent discrimination or gross inequality which we do not find from the record to have occurred.

An important question which presents itself is the same question which was submitted heretofore to the court on demurrer, as to whether or not the assessment made by the township assessor was made in other respects in accordance with law.

As we understand the section of the statute under which this appraisalment was made by the township assessor was 2797 of the Revised Statutes, which reads as follows:

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“Whenever any person, or persons, shall lay out any town or any addition to any town, he or they shall, before the plat thereof is recorded, present the same to the county auditor, who shall cause the assessor of the proper locality to assess and return the true valuation of each lot or parcel of land described in such plat, in the same manner as new structures are valued; and thereupon such lots or parcels shall be entered on the tax list in lieu of the land included therein; but in making such valuation, regard shall be had to the next preceding decennial valuation of real estate, so that the said lots shall, as near as practicable, be equalized with adjacent lands and lots according to such decennial valuation.”

The question which might be made as to the last clause of this section, as we have said, we regard as determined by the finding of the annual county board of equalization of this county.

Plaintiff's counsel make the point that the territory included in these plats of which a revaluation was made by the assessor, is not a town, or an addition to any town.

In the case of *Mitchell & Watson v. Treasurer of Franklin County*, 25 O. S., 143, Judge McIlvaine, in his opinion, says (p. 154):

“The terms of the act of 1866, now under consideration, are ‘that whenever any person or persons shall lay out any town, or addition to any city or town in this state, before the plat thereof shall be recorded,’ etc. That the Legislature did not mean that the addition to any town should be such only as was made of territory without its corporate limits is perfectly clear, for the reason that many towns in this state (within the meaning of the statute) are not incorporated at all. And if no reference was had to the corporate limits of towns, we feel assured that no reference was intended to be made to the corporate limits of cities, although the word ‘city,’ in this state, imports a municipal corporation.

“We are of opinion, therefore, that the plat of an addition, either to a city or town, intended by the statute, is an addition to the territory previously laid out into lots, streets, alleys, etc., the plat whereof has been recorder; and not an addition to the territory embraced within the limits of the city or town as prescribed in its charter.”

The first syllabus of this case is as follows:

“The act of April 6, 1866, ‘to provide for the valuation of land in new town plats, or additions thereto (S. S., 762),’ applies to cases where lands within the corporate limits of a city or town are laid out into lots, streets, etc., as well as to cases where the lots so laid out are situate without the corporate limits.”

We gather from this syllabus, and from the language of the court in the opinion that by “an addition to any city or town” is not only meant land then or thereafter incorporated, but also such land as, lying adjacent to the corporate line of a town, or adjacent to platted property contiguous to such corporate line, will, by virtue of being platted, constitute an addition thereto.

By an examination of the plat attached to the defendant’s statement of facts, we find that the North Riverdale plat, or, in other words, the two Wampler plats, the assessment of which is here in question, is so adjacent to platted property extending from the south line of the Wampler plats to the north line of the corporation as to make the Wampler plat an addition to the city of Dayton.

This being true, our opinion is that this plat comes within the terms of the statute in its provision that when any person shall lay out any addition to any town the auditor shall cause the assessor to assess and return true valuation of each lot or parcel of land described in said plat.

Of course, it will not be contended by counsel that the word “town” does not include “city.”

Again, counsel for plaintiff contend that the township assessor was not the proper officer to make the assessment. A reading of the statute seems to us to determine that question, for in its very terms it says that “the auditor shall cause the assessor of the proper locality to assess and return the true valuation of each lot or parcel of land described in such plat,” etc. It is not contended by counsel that the assessor who made this appraisement was not the assessor of Harrison township, in which this property is situate.

Assessors of real and personal property have always been chosen in this state presumptively as competent men for the purpose, living in the locality. The intention is that a person who

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is acquainted with the real estate and with whatever personal property may be within the township, shall make the assessment for the reason that he is better qualified by such knowledge. The assessor of the proper locality then would be the assessor of the township who would fairly be supposed to know more about the value of the property than the assessor of any other township, or any other assessing officer.

So that, although oftentimes the assessor is not fully up to the standard contemplated by the statute, still the construction of the law ought to be that the proper assessor to assess the real estate in the first instance, or by way of reappraisement, in an event such as here contemplated by the statute, would be the assessor of the particular township in which the property is located.

All of the law with reference to taxation should be read together and a reasonable and proper construction placed upon the language, and not such a construction as would make the clear expression of the Legislature other than the very terms of the statute intend.

The next question made by counsel for plaintiff is as to whether or not the value of the tract platted may be increased as a whole. If the township assessor is the proper officer to make the appraisement, which we have already found, he has only to follow that provision of the section which says he shall "return the true valuation of each lot or parcel of land described in such plat in the same manner as new structures are valued." And also that further provision which reads: "But in making such valuation regard shall be had to the next preceding decennial valuation of real estate, so that the said lots shall, as near as practicable, be equalized with adjacent lands and lots according to such decennial valuation." If the assessor did this—and the question of determining that fact is, as we have said, for the county board of equalization—then the assessment was properly made; and having found that it was so properly made, as we have before determined, we are bound to declare, in the absence of any fraud, fraudulent discrimination or gross inequality, that it was properly made.

In going over the different plats referred to in the statements of fact and comparing them with these plats, the court necessarily has had some difficulty in determining the question as to whether or not there is any gross inequality. But after a careful consideration of the figures found in the statements of fact, we have been unable to determine that the plaintiff is entitled to the relief prayed for.

Our opinion is, therefore, that the prayer of the petitions of the plaintiffs in both cases should be denied.

**BUILDING CONTRACTOR MUST FURNISH STATEMENT TO
OWNER UNDER ALL CIRCUMSTANCES.**

Common Pleas Court of Hamilton County.

PHINEAS S. PHILLIPS V. BRAHAM & COMPANY.

Decided, July 15, 1916.

*Liens—Statement Must be Furnished to Owner by Principal Contractor
—Notwithstanding all Claims for Labor or Material Have Been
Paid.*

The fact that there are no laborers or sub-contractors who have not been paid in full, and no claims for material or fixtures remain outstanding, does not relieve the original contractor from the duty of furnishing to the owner the statement under oath required by Section 8312 as amended, 105 O. L., p. 522.

Shattuck & Hightower, for the Williamson Heater Co.

Bettinger, Schmitt & Kreis, for the Grote Paint & Glass Co.

Cobb, Howard & Bailey, for the receiver.

GEOGHEGAN, J.

Heard on application of the Williamson Heating Company to enforce a mechanic's lien.

The only question presented here is whether or not under the provisions of Section 8312, General Code, as amended May 27,

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1915 (105 Ohio Laws, page 522), it is necessary that the statement under oath required therein be made when there are no laborers who have not been paid in full by the contractor and there are no sub-contractors and no persons to whom anything is due for furnishing machinery, material and fuel.

In this case it appears from the evidence that the Williamson Heating Company furnished the heating system for a building; that the material was taken out of stock, and that the mechanics who did the work both in the shop and on the premises were paid weekly wages. No statement was furnished, and counsel for the company claims that under the circumstances no statement is necessary.

What is now Section 8312, General Code, was originally passed April 8, 1913, and is part of an act entitled, "An act to create a lien in favor of contractors," etc., and is substantially the same as the Michigan act for the same purpose. In the construction of the Michigan act, the Supreme Court of that state held in *Sterner v. Haas*, 108 Michigan, 488, that a failure to comply with the requirement requiring a sworn statement is not excused by the fact that all material and labor had been paid for and that such statement had never been requested by the owner.

Therefore, it would seem that unless the amendment of Section 8312 contained in 105 Ohio Laws, page 522, can be considered as obviating the necessity of a statement under such circumstances, the construction put upon the act by the Supreme Court of Michigan should control here. The only change made in that section as far as the court has been able to determine after a careful examination, is that the amendment provides that the statement should show the name of every laborer in the employ of the contractor who had not been paid in full, whereas, the original section provided that the statement show the name of every laborer in the contractor's employ. The difference seems to be that the Legislature has by the passage of the amendment dispensed with the necessity of putting in the names of laborers who had been employed upon the work,

but who had been paid in full for their work. But this can not be said to obviate the necessity for the statement itself. The law is explicit in demanding a statement, and it would seem to be a matter of sound policy to hold, as was held in Michigan, that even though there be no laborers or others to whom anything is due from the contractor, the statement should be furnished so that the owner would have the benefit of the contractor's affidavit with reference to the matter.

This view is also supported by the case of *Clark v. Anderson*, 88 Minn., 200, wherein the court, construing the mechanic's lien law of that state in so far as it applies to the furnishing of a verified statement of the amounts due to laborers or material-men, said:

"The fact that there are no laborers or others to whom anything is due from the contractor for work upon or material used in the construction of the building, does not suspend the operation of the statute. If there be none such, a verified statement accordingly will be sufficient compliance with the statute."

Therefore, as the lien law is in derogation of the common law, and all rights under it are statutory and can not be extended beyond the provisions of the statute, it would seem that as a statement is provided for in the law, it should be furnished, even though it is negative in substance.

The lien, therefore, of the Williamson Heating Company will not be allowed.

With reference to the lien of the Grote Paint & Glass Company, I have already disposed of that matter from the bench, finding that the company had a valid lien.

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CIRCUMSTANCES WHICH RENDER VALID AN ANTE-NUPTIAL CONTRACT.

Common Pleas Court of Preble County.

HATTIE E. STOTLER V. JOHN H. STOTLER ET AL.

Decided, June 16, 1916.

Ante-Nuptial Contracts—Parties Thereto Do Not Deal at Arm's Length, But Stand in a Relation of Confidence—Highest Degree of Fairness and Good Will Must be Exercised—Fraudulent Concealment Will be Presumed Against the Husband, When—Rights of the Wife After Becoming a Widow Not Barred Unless Contract Has Been Fairly Performed by the Husband.

1. An ante-nuptial contract, fairly and freely entered into with a full understanding of the effect it will have upon the future rights of the respective parties, will not be held invalid solely because the wife does not receive as much as she would under the law if there was no contract.
2. It is the duty of the husband not only to inform her of the extent of his wealth before such contract is entered into, but to advise her as well of the nature, extent and value of the interest in his estate she was giving up, and if the provision made for her is apparently inequitable, unjust and unreasonably disproportionate to the means of the intended husband, a fraudulent concealment thereof will be presumed, and before she will be held thereto those contending for the validity of the contract have the burden of establishing full knowledge on her part of all facts materially affecting her rights.
3. Such contract will not operate to bar the wife of her rights as widow under the law in his estate, unless the husband while he lived fairly performed the provisions thereof accruing in her favor during his lifetime.

Lowry & King, Risinger & Risinger and P. A. Saylor, for plaintiff.

Fisher & Crisler, Shockney & Chattin, and E. P. Vaughan, contra.

BOWMAN, J.

The plaintiff brings this action as the widow of Edward S.

Stotler to set aside and cancel an ante-nuptial contract, which she entered into with the deceased prior to their marriage.

The amended petition contains two causes of action. In the first she alleges her want of knowledge of the extent, character and value of his property and his failure to disclose the same to her, and that the amount provided for her in said contract was so disproportionate to his wealth as to render it invalid; and in the second, that the deceased failed to carry out the contract in his lifetime.

The defendants demur on the ground that neither states facts which show a cause of action.

It is elementary, that every cause of action must contain two factors: (1) plaintiff's primary right and defendant's corresponding primary duty; (2) the wrongful act or omission of the defendant by which such primary right and duty have been violated, and the material facts only which constitute such primary right and duty and the wrongful act or omission violative thereof, need be alleged.

It is necessary therefore to ascertain and determine the relative rights and duties of the parties to said contract at the time of the execution thereof.

It is the settled law of this state, that such contracts will be upheld if fair, reasonable and just as between the parties, in view of all the circumstances of the case at the time of the execution thereof. *Grogan v. Garrison*, 27 O. S., 64. If fairly and freely entered into, with a full understanding of the effect they will have upon the future rights of the respective parties, they will not be held invalid *solely* because the wife does not receive as much as she would under the law if there was no contract.

But if the provision made for the wife is disproportionate to the means of the intended husband, or is apparently inequitable, unjust and unreasonable, a presumption arises of concealment of his financial condition and that he did not make a full disclosure thereof, and those contending for the validity of the contract have the burden of proving full knowledge on her part of all facts materially affecting her rights. *Rankin v.*

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Schierreck, 166 Ia., 10; *Fisher v. Koontz*, 110 Ia., 498, 500; *Graham v. Graham*, 143 N. Y., 573, 579; *Pierce v. Pierce*, 71 N. Y., 154, 158; *Landes v. Landes*, 268 Ill., 11; *Warner v. Warner*, 235 Ill., 448, 462; *Hessick v. Hessick*, 169 Ill., 486; *Gaines v. Gaines*, 163 Ky., 260; *Russell v. Russell*, 129 Fed., 441; *Warner's Estate*, 210 Penn., 431, 434; *Duttonhofer v. Duttonhofer*, 12 O. Dec., 736, 743.

The courts are required, therefore, rigidly to scrutinize all the circumstances surrounding the execution of such contracts, because the parties are not dealing at arm's length, but stand in such a relation of confidence to each other as to call for the exercise of a high degree of fairness and the utmost good faith on the part of each. In *Russell v. Russell*, 129 Fed., 434, it is said at page 441:

"It can not be expected that either will pry into the money affairs of the other, except possibly in the most general way; or conduct an independent investigation with regard to them. The amenities of the situation forbid it, if nothing else. It is too suggestive of a mercenary motive in the marriage, which should be prompted by mutual affection, to be sanctioned. Each must therefore, of necessity, derive knowledge from the other of his or her property, and both must be frank. No agreement on any other basis will stand, as all the cases attest."

In *Kline v. Kline*, 57 Penn., Mr. Justice Sharswood, speaking at page 122, says:

"There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and sellers, and to say that they are dealing at arm's length, we think is a mistake."

Referring to the facts in that case, he says at page 123:

"To say that she was bound when the contract was proposed to exercise her judgment, that she ought to have taken advan-

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tage of the opportunity that existed to obtain information, and that if she did not do so it was her own fault, is to suggest what would be revolting to all the better feelings of woman's nature. To have instituted inquiries into the property and fortune of her betrothed, would have indicated that she was actuated by selfish and interested motives. She shrank back from the thought of asking a single question. She executed the paper without hesitation, and without inquiry. She believed that he would propose nothing but what was just, and she had a right to exercise that confidence."

Therefore, as said in *Warner's Estate*, 210 Penn., 434:

Plaintiff "had a right to assume that her prospective husband would act *justly* with her. Hence his duty to be frank and unreserved in the disclosure of all the circumstances materially bearing on the contemplated agreement. The *duty* and *responsibility* of full disclosure were his."

But mere disclosure alone was not the full measure of his duty, nor is it true that it "hath this extent, no more." Something more was required of him. It was his further duty "to advise her of the nature and extent of the interest in his estate that she was giving up." *Slingerland v. Slingerland*, 115 Minn., 270, 275.

Applying now these principles to the facts alleged in the first cause of action, we find that at the time of the execution of said contract the plaintiff was a widow with four minor children without property or means and wholly dependent upon her own labor for the support of herself and children, and that her situation at said time was fully known to said Edward S. Stotler; that his sole and only heir-at-law was a son by a former marriage; that he was in his seventy-fifth year, and worth far in excess of \$100,000, and at his death sixteen years later, he was worth, over and above all indebtedness, including costs of administration, about \$350,000.

The provisions for the plaintiff under said contract were the payment to her of the annual sum of \$100 during their joint lives, and \$6,000 at his death, to be evidenced by his promissory note payable at that time, with interest after maturity.

These provisions were to be in lieu of and in full satisfaction

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to plaintiff of her dower, distributive share and all statutory or other rights that she would be entitled to in his estate as his widow by virtue of their marital relations in the event she survived him.

No one will claim that she will receive anything near as much as she would under the law if there was no contract. All must concede that the provisions made for her are not only disproportionate to the amount she would have received if there had been no contract, but so unreasonably small when compared thereto as to be unfair, inequitable and unjust. But however that may be, she will be bound and concluded thereby if she was duly advised and informed by her prospective husband of the extent, character and value of his property, and of all the facts materially affecting her rights, and the nature and extent of the interest in his estate she was giving up.

This he did not do. Not only so, but she had no knowledge thereof, the allegation being—

“That said Edward S. Stotler did not disclose to her, and she had no knowledge of the nature, character or amount of his property.”

If she had no knowledge thereof and he did not make a full disclosure of the same to her, a fraudulent concealment thereof on his part will be presumed, and the contract should be set aside upon the presumption of such fraudulent concealment. *Warner's Estate*, 210 Penn. St., 431, 434.

She may have known that he was reputed a rich man, and not know the extent of his wealth. Reputation of wealth, however, is not enough, for it is too indefinite to charge her with knowledge of the kind and amount of his property. *Mines v. Phee*, 254 Ill., 60, 62; *Landes v. Landes*, 268 Ill., 11.

It follows that the first cause of action states facts sufficient to show a cause of action, and the demurrer thereto is overruled.

Coming now to the demurrer to the Second cause of action, it is alleged therein that for many years prior to his death, Mr. Stotler failed and refused to make said annual payments to his wife provided in said contract, and treated the same as canceled and absolutely null and void and no longer in ex-

istence or binding upon the parties. Notwithstanding these averments, it is urged in support of the demurrer, that his failure to make said payments did not abrogate or annul the same; that it was not in his power to rescind, set aside and cancel said agreement by his failure to make such payments, and that the utmost claim of plaintiff now to relief because of his failure to carry out the same in his lifetime is against his estate to recover the amount thereof.

It may be conceded that it was not in his power to rescind said contract as against the plaintiff, without her consent or acquiescence, by his mere failure to comply therewith. But here the question is not so much whether he could do so, as whether the wife is bound by the provisions of a contract that her husband did not recognize as binding upon him nor carry out or perform in his lifetime. He was not at liberty wholly to ignore its provisions in her favor during his lifetime and insist at the same time that she was to be bound thereby. Unless a contract is binding on both parties, it is not binding on either of them. *Rehm-Zeiher Co. v. Walker Co.*, 156 Ky., 6.

While some courts have held that misconduct of one party to an ante-nuptial contract or refusal or failure fairly to carry out or comply in good faith with the provisions by such party to be performed will not release the other unless a stipulation to that effect is contained in the contract, it is the settled rule in this state that it will not operate as such bar even in the absence of such stipulation unless fully performed upon the part of the other. *Phillips v. Phillips*, 14 O. S., 308, 314. If, therefore, plaintiff is to be held to its terms, her husband was equally bound to perform its conditions in her favor during his lifetime.

Here the contract obligated the husband while he lived to pay plaintiff the annual sum of \$100. This it is alleged he failed to do for many years prior to his death. If so, it was not performed on his part, and if he had thereby released her from its obligations and she was no longer bound thereby, it is not now in the power of his legal representatives to hold her thereto merely because she would have a claim for said unpaid instalments against the estate of her deceased husband, nor would a

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tender or offer to pay the same now affect her right to insist that the contract should be set aside. *Slingerland v. Slingerland*, 115 Minn., 270, 276.

As it is alleged in the second cause of action not only that the contract was not even fairly performed, but for many years was not performed at all, the facts therein alleged show a cause of action.

The demurrer thereto is therefore overruled.

ACTIVITIES OF STRIKERS LIMITED BY INJUNCTION.

Common Pleas Court of Cuyahoga County.

THE STATLER COMPANY V. HOTEL AND RESTAURANT EMPLOYEES'
INTERNATIONAL ALLIANCE AND BARTENDERS' INTER-
NATIONAL LEAGUE OF AMERICA ET AL.

Decided, January 21, 1914.

Strikes—Injunction Against Demonstrations by Hotel and Restaurant Employees of a Character Injurious to Their Late Employer—Picketing Permitted but in a Modified Form—Principles Applicable in Cases of Labor Trouble—In Actions Growing Out of Such Trouble One or More May Sue or Defend for All, Where Unincorporated Associations Are Involved—Section 11257.

During a strike of employees of a hotel, the activities of the strikers in the immediate vicinity of the hotel may be limited by injunction to the maintenance of two pickets on each street upon which the building fronts, who must not approach nearer the building than the middle of the street, or conduct themselves in other than a peaceable manner, and they may not circulate cards containing language derogatory of the hotel or its service, or announce that a strike is on in other than a moderate tone of voice. And crowds of strikers and their sympathizers may be enjoined from gathering within the limits mentioned, or from indulging in boisterous conduct, or jostling or interfering with guests or employees entering or leaving the building.

LAWRENCE, J.

Where an injunction is sought in controversies between employers and employees which have resulted in a strike by the

latter, little aid is usually to be derived from an examination of the decisions of courts in other similar cases, for almost always the question comes to the application of well established principles to the facts of the particular case. Fundamentally, the principles which apply in a case like this are the same as apply in any other case in which it is claimed that individual or property rights have been injuriously affected or interfered with in such manner as to make the ordinary legal remedies inadequate.

There is no question of the right of the former employees of the Statler Company to strike and quit their employment, or of their right to use peaceable argument and persuasion to induce others not to accept employment in their places. They also have the right, by fair and peaceable means, to advise or persuade those who have accepted such employment, to quit the same, there being no proof of any attempt to induce such persons to break a contract for a definite term of service.

On the other hand, there can be no question that the strikers or others associated with them, have no right to use threats, violence, intimidation or coercion to accomplish these objects. Nor have they a right to obstruct access to their former employer's place of business, or to threaten, insult or unreasonably interfere with its guests or patrons in any way, nor have they the right to cause wanton or wrongful injury to the business or property of the plaintiff, or to join together with the motive or intent of causing such injury.

In my opinion, the weight of authority supports the right of strikers, as an incident of their right of persuasion, as well as a means of obtaining information, to maintain what are called "pickets," provided such pickets are limited in number, and the picketing is carried on in a peaceable and lawful manner without violence, threats or intimidation, without obstruction to the premises of any other person, and without annoying others or causing a nuisance in the vicinity by loud cries, noise or other disturbance. In other words, whether picketing in a given case is lawful or otherwise, depends on the manner in which it is carried on. In this case the evidence shows that since the 16th day of December last there have been shifts of ten to

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fifteen men regularly employed and paid as pickets, who during much of the time, from about five o'clock A. M. to one o'clock A. M. of the following day, walk back and forth upon the sidewalk on Euclid avenue in front of the Statler Hotel, calling out and shouting in loud tones of voice that the hotel is unfair to organized labor, besides many other things reflecting on the hotel and its employees, which I can not now state accurately. That in addition to the regularly employed pickets, there are at times large numbers of volunteers who join in, thus marching back and forth and shouting. That occasionally guests, as they are entering the hotel, have been obstructed by some of these men. That there are also some five sandwich men, so-called, who march in front of the hotel carrying banners with inscriptions thereon uncomplimentary to the hotel and its employees, and that Mr. Farrell, the business agent of the Local Union No. 106, is present during a good part of each day, and has general charge of what has been done. In addition to what I have already stated, these pickets distribute cards to guests and passers by, insinuating that there is danger of poison being placed in food served within the hotel. Some few of the waiters who took the place of strikers had such relations with the men on picket duty that they were able to go outside of the hotel and, perhaps, about the city, but the greater number of such employees have been substantially prisoners within the hotel, because of threats made against them and of actual violence committed on a few of their number who did venture to go outside.

The result of all this has been an almost continuous noise and confusion in the vicinity of the hotel by means of which its guests have suffered annoyance, and their rest at night has been disturbed, and this noise was of such a character that it must also have been an annoyance to persons on the street or in other buildings in the neighborhood. Necessarily, too, the congregating of so many men upon the sidewalk in front of the hotel must be an obstruction to persons desiring to enter or leave the hotel, as well as to persons passing by on the sidewalk.

I can have no doubt that those who are carrying on this strike have gone beyond their legal rights in much that has been done, and that the necessary tendency of their acts is to unlawfully

and wrongfully injure the business and property of the plaintiff.

It has been argued, however, that no substantial damage has been shown by the hotel company, inasmuch as its business has continued, and its available rooms have been well occupied. The patronage of this hotel, coming from persons who can afford to pay the prices charged there, may be of such a character that not many of its guests have a very altruistic interest in the questions at issue between the hotel and its former employees, but still I can not see why there would not be some loss of business. Certainly what has occurred is calculated to have that effect, and it has been shown that the business of the restaurant and bar has been diminished; besides, there is the loss of the use of the guest rooms occupied by the present employees and the expense of employing a number of detectives or guards.

There is another question to be considered before coming to a final conclusion whether an injunction shall be issued, and that is whether such injunction is necessary. It is always to be regretted when a court is called upon to interfere in a case of this kind, not only because of the difficulty of defining definitely the rights of the parties in a decree which must be drawn in general terms, and also because of the inadequacy of the means which the court has to supervise or enforce compliance with its orders, and I think that an injunction should never be granted in a labor dispute where the acts complained of are covered by penal statutes or ordinances, and the police department and police court are able and willing to perform their respective duties.

Undoubtedly, some of the things which have been done here in violation of the rights of the plaintiff are not within such statutes or ordinances, but it does seem to me that there has been disorderly conduct and obstruction of the sidewalk in front of the hotel which could have been prevented by the police. An ample force of policemen were detailed for duty, but they seemed to feel that they were merely umpires in a game played without rules.

I think, therefore, that a temporary injunction must be granted in the respects I shall presently explain, but it is necessary first to determine against whom the same shall run.

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. It is argued on behalf of some of the defendants that the unincorporated volunteer associations are not proper parties to this action. I think that is true, technically speaking, so far as the organization by its accustomed name is concerned. I think that is true, because under our statute there is no authority for bringing such an association by any process before the court unless it partakes of the character of a partnership.

I think, however, that counsel go too far when they say that the principle of Section 11257 of the code does not apply in a case like this. This section provides:

“When the question is one of common or general interest of many persons, and the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.”

Now, our Supreme Court has spoken of that statute in the 50 O. S., page 703. I read from page 712:

“Though such associations are not corporations, they possess some of the attributes of corporations, and in these respects differ from ordinary mercantile co-partnerships. They can sue and be sued in the name of the president or treasurer, and their capital stock is represented by stock certificates which are transferable. The death of a member or transfer of his shares does not dissolve the company, which is thus made capable of perpetuity like a corporation, and it can so hold real or personal property. While the petition does not in terms aver that it is impracticable to bring all shareholders before the court, the impracticability of doing so appears from the allegations as to the nature of the association and the number of its shareholders.

* * *

“We see no reason why a judgment against the plaintiff will not be binding upon all whom he represents, or judgment in his favor enure to their benefit. Each stockholder by becoming a member of the association gave his consent as to that rule of its being, that suits in its behalf might be prosecuted according to the law applicable to it, and the judgment in any action so prosecuted with such consent, must necessarily operate upon all as if they were named in the suit.”

Now, in *Bates Pleading and Practice*, the first volume, page 70:

“As an unincorporated association can not sue in its own name unless it can come in under the partnership statute; it must sue in the name of its members, and if these are too numerous to be brought on the record, the class suit statute applies.

“The section applies although another statute provides that the association could sue in the name of its president. The rule applies to defendants, and all the members of an unincorporated association need not be brought in, but only enough to insure a fair trial. *Van Houton v. Pine*, 36 N. J. Eq., 133; *Keller v. Tracy*, 11 Iowa, 530. So an unincorporated labor union being made a party with one or more members in a representative capacity, an injunction served on the union and all its members. *Hillenbrand v. Trades Council*, 14 Oh. Dec., 628.”

That, I think, is the same injunction that was involved in the case in the later volume of the Ohio Decisions on a proceeding for contempt which was reversed. This was the case granting the injunction, and I have seen no place where that has been reversed, at least on the point involved there.

Another case appears in 7th N.P.(N.S.), 49. I will read from the syllabus:

“One object of Section 5008, Revised Statutes, is to enable nondescript associations of persons to obtain a standing in court, without inordinate delay and expense, and it is sufficient, both for jurisdiction and for judgment, if the interest that is held in common be fairly represented by those who are in court.”

The question in this case is, whether the rule is applicable to both the plaintiff and the defendant. I am not quite sure about that.

In Modern Law of Labor Unions, Sections 214 and 217, there are some remarks on this question. I read first from page 214:

“Technically, proceedings against an unincorporated labor union are proceedings against the members individually, and not in *solido* against the union, as in the case of incorporated societies, and while the union may sue or be sued by joining all the parties as plaintiffs or defendants, it can neither sue or be sued in its common name either at law or in equity in the absence of some statutory provisions authorizing such procedure.”

Then I go forward to Section 217:

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“In equity the rule in respect to parties to suits by and against unincorporated labor unions, is not so strict as in actions at law. Where the parties are numerous, a bill may be brought by a few of the members or officers in a representative capacity, in behalf of themselves and of other members, and a bill may likewise be maintained against a few of the members or officers, as representing the whole membership of the union.”

Some cases are quoted which I have not examined. This being a suit in equity, the principles prevailing in courts of chancery may well be considered, and it seems to me that there can be no question that where a sufficient number of the members of a voluntary association have been brought before the court so as to be fairly represented, that the bill made against the persons present before the court will bind them and other members of the organization.

Having concluded that an injunction must be issued in this case, I will next speak of the scope of such injunction. In order to make the decree as definite as possible, so that it may be understood, I intend to divide the order into two parts:

First, as applicable to the territory immediately in front of the hotel on both streets, and extending to the middle of the street. Within that territory I think that the decree should definitely state, so far as it can be done, in words, just what can be done and what can not be done. As I have already indicated, I think that it is lawful to employ pickets, provided they are limited in number and they act in a peaceable way. It seems to me that not exceeding two pickets on each side of that building be allowed, that that would be ample to accomplish all ends to be accomplished by means of pickets. I think also that the persons on picket duty there should not be allowed to continually, or at any time, cry out in loud tones of voice, or make any sort of noise or disturbance; that they should not circulate cards containing any abusive language toward the hotel, or any insinuations with respect to the character of the food served in the hotel. Within the territory I have defined, there should be no obstruction to guests entering and leaving the hotel, and no further conversation with them except a mere announcement that a strike is on within the hotel, and that within the limits

I have mentioned there shall be no accosting, talking with or threatening in any manner the present employees of the hotel or any of them.

“MR. STRONG: Your Honor, you say they can not say anything but that there is a strike on?”

“THE COURT: I think that is substantially all that should be said to any guests coming to or leaving the hotel, and that that should be done in a quiet manner, and not by getting around the guests on two sides.”

Outside of this territory that I have mentioned, I think that a decree may be couched in more general terms, in the first place, that all persons to whom this injunction applies may be enjoined from congregating on the sidewalks in front of the hotel, either by standing or walking back and forth, for the purpose of interfering with, hindering, delaying or stopping the business of the hotel in any form or manner. That they may be enjoined from compelling, inducing, coercing, by threats, intimidation or violence, any of the employees of the plaintiff or any person or persons seeking employment, and also from compelling, inducing, coercing by threats, intimidation or violence, or attempting to induce or coerce by force or violence any of the employees of plaintiff to leave its service. If they keep far enough away from the hotel, they may carry any banners that the police will allow them to carry.

“MR. STRONG: Is that outside of the middle of the street?”

“THE COURT: In that territory there will be no banners. If they bring banners up to the very edge of that territory, I shall enlarge the scope of the injunction to meet that. Perhaps I had better add a few feet to the territory mentioned.”

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Walker v. Bumiller.

LIABILITY FOR RENT OF A TENANT WHO HAS HELD OVER.

Common Pleas Court of Hamilton County.

W. S. WALKER v. HERMAN BUMILLER.*

Decided, 1916.

Landlord and Tenant—Charge of Court—As to Defenses by a Tenant Who Has Held Over—Findings May Not be Asked of the Court, When.

1. In an action for rent against a tenant who has held over and who claims an oral agreement that the new tenancy should be from month to month and that there had been a surrender, the jury should be instructed that the burden is on the defendant to substantiate both defenses in order to escape liability.
2. It is not within the province of a trial court to include findings in an entry where there has been a verdict by a jury and no interrogatories were submitted.

E. H. Brink and C. B. Wilby, for motion.

Dempsey & Nieberding, contra.

MAY, J.

Memorandum opinion overruling motion for a new trial.

This was an action for rent. It had been tried in the justice's court and came into the common pleas court on appeal. The plaintiff contended that the defendant was liable, having held over after a previous written lease. The defendant was permitted to introduce evidence that one month prior to the termination of the written lease the plaintiff and defendant orally agreed that the new tenancy should be from month to month at the expiration of the lease. The defendant also claimed there had been a surrender and an exception to the surrender.

In submitting the case to the jury the court charged the jury that the burden of proof was upon the defendant to substantiate

*Reversed by the Court of Appeals by a divided court, *Walker v. Bumiller*, 25 C.C.(N.S.), 385; Court of Appeals reversed and Common Pleas affirmed by the Supreme Court.

both defenses; that if the jury found that the defendant took possession of the property at the expiration of the prior lease under the new agreement for monthly tenancy, they should find for the defendant.

The objection is made to this charge because it violates the statute of frauds. Whatever may have been the law in this state on this question it certainly was changed by the ruling of the Supreme Court in the case of *Corbin et al v. Hafer*, 72 Ohio St., 685. In that case the same question as that presented in this case was decided. The General Term held such an agreement void. *Hafer v. Corbin et al*, 6 N.P.(N.S.), 468. The Supreme Court reversed this and entered judgment for the defendant, which was the verdict of the jury as returned in the case in Special Term, using the following language, 72 Ohio St., 685:

“Judgment of the General Term reversed and that of the Special Term affirmed on the authority of *Moore v. Harter*, 67 Ohio State, 250.”

Believing myself bound under the rule of *stare decisis* to follow the Supreme Court, the motion for a new trial on this point is overruled.

On the matter of the surrender I am of the opinion that if the jury returned a verdict based upon this defense, that its verdict was manifestly against the weight of the evidence, and if this had been the only question in the case I should not have hesitated to set aside the verdict.

Counsel for plaintiff presented to the court an entry in which they asked the court to make a finding to this effect, but the court does not think it is within its province to make distinct findings in an entry where there was a verdict of the jury and where no special interrogatories had been asked.

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Wyoming v. Guaranty Co.

**ASCERTAINMENT OF THE AMOUNT DUE FROM THE SURETY
UNDER A BOND FOR VILLAGE DEPOSITS.**

Common Pleas Court of Hamilton County.

**THE VILLAGE OF WYOMING v. CITIZENS TRUST & GUARANTY
COMPANY OF WEST VIRGINIA.**

Decided, January term, 1917.

Sureties—Bonds Covering Deposits of a City or Village—Provide Security Only to an Amount Within Ten Per Cent. of the Face of the Bond—Notwithstanding the Deposits Greatly Exceeded That Sum.

1. A bond securing deposits made by a city or village in a designated depository, under the provisions of Section 4295, G. C., is a statutory bond into which the provisions of the statute must be read, and the surety must be held to have contracted with a view to the statutory provisions.
2. A bond in the sum of \$10,000 secures deposits to the amount of \$9,091 only, and where deposits are made in excess of that sum, and the bond is not increased correspondingly, and the depository becomes insolvent, the amount recoverable under the bond is ascertained by deducting from \$9,091 all dividends received and assessing against the surety what remains unpaid of that sum with interest.

S. C. Roettinger, Solicitor of the village of Wyoming, and
James E. Robinson, for plaintiff.

Pogue, Hoffheimer & Pogue, contra.

NIPPERT, J.

The defendant in this case is a corporation under the laws of the state of West Virginia, authorized to do business in the state of Ohio, and was at the time this cause of action arose engaged in the general surety business. On or about the 6th day of July, 1909, the defendant, the Citizens Trust & Guaranty Company, entered into a contract with the Metropolitan Bank & Trust Company of Cincinnati, Ohio, as principal, to be held

bound in the sum of \$10,000 to the village of Wyoming, upon a certain bond and obligation.

The Metropolitan Bank & Trust Company was designated the depository for the funds of the village of Wyoming by a resolution adopted by the unanimous vote of all members of council and which reads as follows:

“Be It Resolved, by the Council of the Village of Wyoming, Ohio, that bids for the Village funds of the Village of Wyoming, Ohio, having been received by the Finance Committee of the Council of the Village of Wyoming, Ohio, and it appearing to said Finance Committee and to the Council of said Village, that the bid of the Metropolitan Bank of Cincinnati, Ohio, is the highest and best bid, that the said Metropolitan Bank of Cincinnati be designated as the depository of the Village Funds of the Village of Wyoming, Ohio, and the Treasurer of said Village be and he hereby is authorized and instructed to deposit the funds of the Village of Wyoming, Ohio, in the said Metropolitan Bank of Cincinnati, Ohio, in the manner provided by law and in accordance with the terms of said bid.

“Done at the Council Chamber in Wyoming, Ohio, on the 21st day of June, 1909.

“W. A. CLARK, Clerk.

JOSIAH KIRBY, Mayor.”

The terms of the bond of the defendant, which the Metropolitan Bank & Trust Company offered as security to the village of Wyoming for its deposit, provided that if during the period beginning on the date of the bond, to-wit, July 7, 1910, and fully to be completed on the 6th day of July, 1910,

“the said Metropolitan Bank & Trust Company shall receive, safely keep, and pay over, all moneys which may come under its custody under and by virtue of the laws of the state of Ohio, relating to such depositories, and under and by virtue of the said bank’s contract with the said incorporated village of Wyoming, and shall properly account for and pay over, as required, the interest on such deposits at the rate agreed upon, and shall faithfully perform all the duties imposed by the laws of the state of Ohio upon it as a depository of the moneys of said incorporated village of Wyoming, then this obligation shall be null and void; otherwise to remain in full force and virtue.

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“Provided, however, that this obligation is entered into by the surety upon the following express conditions:

“1. That in the event of a default on the part of the principal, the surety herein shall only be liable for such proportion of the total loss thereby sustained by the incorporated village of Wyoming as the penalty of this bond shall bear to the total amount of the security held by the said incorporated village of Wyoming, to cover said deposits (if the said village holds, or should hold, any security other than this bond), and in no case shall the surety herein be liable for an amount in excess of ten thousand dollars (\$10,000). * * *

“This bond to take effect on the 7th day of July, 1909, and expire at the close of banking hours on the 6th day of July, 1910, but may thereafter be renewed for a further period by the written consent of the principal and surety. * * *

“THE METROPOLITAN BANK & TRUST COMPANY,
VIRGINIA,

By T. F. McCLURE,
President.

“CITIZENS TRUST & GUARANTY COMPANY OF WEST
By W. G. PETERKIN,
President.

“Approved, S. C. ROETTINGER,
“*Solicitor.*”

By mutual consent the terms and conditions of this bond were extended to the close of banking hours on July 6. 1912.

On September 19, 1911, the incorporated village of Wyoming, through its mayor, notified the Citizens Trust & Guaranty Company that on Monday, the 18th of September, 1911, the Metropolitan Bank & Trust Company was closed by order of the State Bank Examiner.

At the time of the notice it was impossible to tell just what per cent. the assets of this bank would pay. It has since developed, however, and the figures are undisputed, that at the time of the suspension of payment, that is, September 18, 1911, the village of Wyoming had on deposit \$19,306.19, a sum far in excess of the face of the bond, and that since the suspension the bank has paid through its receiver dividends in the amount of fifty-five per cent. to the depositors upon the amount of their

respective deposits, being \$10,618.40 in this case, and leaving a net balance of \$8,687.79 due the said village of Wyoming on its deposits with the Metropolitan Bank & Trust Company.

The Citizens Trust & Guaranty Company, the defendant in this case, on the 22d day of April, 1913, paid to the village of Wyoming the sum of \$4,756.50, to apply on the liability of said bond (\$4,500 on account of the bond and \$256.50 for interest), the said surety company claiming that this is the full amount of its liability under said bond due to said village of Wyoming, while the said village of Wyoming claims that the said surety company is liable for a further amount of \$4,187.79 in addition to the above payment, together with interest from the 22d day of April, 1913, for the reason that the amount due under said bond to said village should cover all loss to said village up to a sum not in excess of \$10,000, irrespective of any dividends that may have been declared.

It is this point which remains to be decided in the case at bar since the parties to this suit can not agree upon the question of their respective legal liabilities.

It is not denied by the village that its treasurer deposited a greater sum of money in the Metropolitan Bank than was provided for by the terms of the bond, and that this was done without the consent or knowledge of the surety.

The resolution of council under which the money was deposited recites the following:

“And the treasurer of said village be and he hereby is authorized and instructed to deposit the funds of the village of Wyoming, Ohio, in the said Metropolitan Bank of Cincinnati, Ohio, in the manner provided by law and in accordance with the terms of said bid.”

At the time when the surety company in this case originally executed the bond in question, that is, July 7, 1909, the act relating to depositaries was in effect. See Ohio Laws, Volume 97, page 270, passed April 20, 1904.

This bond, however, was renewed from time to time, during which period the Legislature amended the act of April, 1904,

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by passing Section 4295 of the General Code (Vol. 102 Ohio Laws, page 122), and it was this section of the statute which was in force at the time of the default of the principal and therefore must be considered and read into the bond to determine the rights of the creditor and the liability of the surety.

The provisions of this section as amended, in so far as they pertain to this case, are as follows:

“The council may provide by ordinance for deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the county, as offer at competitive bidding, the highest rate of interest and give a good and sufficient *bond* * * * said security to be subject to the approval of the proper municipal officers, *in a sum not less than ten per cent. in excess of the maximum amount at any time to be deposited.*”

Among the important provisions of the bond in question are the following:

“Now, therefore, if, during the period beginning on the date of this bond, the said the Metropolitan Bank & Trust Company, shall receive, safely keep and pay over, all moneys which may come under its custody under and by virtue of the laws of the state of Ohio, relating to such depositaries, and under and by virtue of the said bank’s contract with the said incorporated village of Wyoming, and shall properly account for and pay over, as required, the interest on such deposits at the rate agreed upon, and shall faithfully perform all the duties imposed by the laws of the state of Ohio upon it as a depositary of the moneys of said incorporated village of Wyoming, then this obligation shall be null and void; * * *

“Provided, however, that this obligation is entered into by the surety upon the following express conditions:

“1. That in the event of default on the part of the principal, the surety herein shall only be liable for such proportion of the total loss thereby sustained by the incorporated village of Wyoming, as the penalty of this bond shall bear to the total amount of security held by the said incorporated village of Wyoming to cover said deposits (if the said village holds, or should hold, any security other than this bond), and in no case shall the surety herein be liable for an amount in excess of ten thousand dollars (\$10,000).”

The surety company's liability depended upon the terms of the bond. The bond in this case is a statutory bond and the statutes pertaining to its subject-matter must be read into the bond itself as one or more of its terms and the obligor must be held to contract with a view to the provisions of the statute. Thus the provisions of Section 4295 become part of the contract of surety and equally binding on all the parties.

The court, in the case of *State, ex rel, v. Rubber Mfg. Co.*, 149 Mo., 189, at 212, says:

“As a general rule neither principal nor surety is obligated beyond what is nominated in the bond. But that is not always so either as to the one or the other. And it is not so in this case. When the parties execute a statutory bond, they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions.”

See also, *Banks v. DeWitt*, 42 Ohio St., 263, reading page 274; *Helt v. Whittier*, 31 Ohio St., 476.

Since the village of Wyoming at no time had a bond of more than \$10,000 to secure its deposits with the Metropolitan Bank & Trust Company, said amount being a sum not less than ten per cent. in excess of the maximum amount at any time to be deposited, the village was not permitted to have more than \$9,091 at any one time on deposit with said bank, its legal deposits being thus limited by the provisions of Section 4295. As the village increased its deposits it should have, in compliance with the law, also required the bank to furnish additional security. This the village of Wyoming failed to do and the village becomes liable by its neglect to comply with the terms of the statute intended to protect the tax-payers in like or similar cases.

So that, where a surety has agreed to pay for any loss accruing to its principal under the terms of a certain contract setting forth its obligations and liabilities, the bondsman can not be held for the loss sustained by the village under an entirely different condition of things than were in existence either at the time of making the contract or in contemplation at that time by either

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party, and last, but not least, under conditions *not* approved by the statute of our state.

Should the loss occasioned by the failure to comply with this law fall upon those whom the law designates as the persons chargeable with the duty of its performance, or upon a party who has complied with the terms and obligations as set out and strictly defined by a contract, which presupposes the compliance with the law on part of the village or its treasurer?

It does not appear equitable that the surety company in the case at bar, having complied with the terms and conditions of its obligation, should now be made to suffer by reason of the non-observance of the law in respect thereto by the plaintiff. All inconvenience or loss which the plaintiff has suffered would have been avoided if plaintiff had complied with the terms of the statute. If, upon increasing its deposits with the Metropolitan Bank, the village of Wyoming had also insisted upon the bank furnishing additional security, as provided by Section 4295, General Code, no loss would have been suffered by the village of Wyoming. But, instead of increasing the security, the village council disregarded the provisions of the statute and upon the suspension of payment on part of the bank, the village was confronted with a serious loss, unless it could apply all of the dividends to the payment of its claim and in addition receive from the surety company, the defendant herein, the full amount of the bond, to-wit, \$10,000.

The surety company, however, contends that since the law permitted the village to deposit no more than \$9,091 with the Metropolitan Bank as long as the surety to secure said deposit remained at \$10,000, that the loss sustained by the village, under the provisions of this bond, should be paid, as far as possible, out of the assets of the bank, and if they are not sufficient to pay the loss that then the surety company is to contribute so much under the bond as together with the dividends declared will total the sum of \$9,091.

As a matter of fact, fifty-five per cent. of \$10,000 has been paid on account of the claim of the village of Wyoming against

the bank, and the surety company has paid the balance of forty-five per cent. to the village, or \$4,756.50, claiming that this is in full of its obligation under the terms of the bond and the provisions of the statute.

Under the circumstances of this case, the village ought not be permitted to apply all of the dividends so received from the bank to the unsecured portion of its deposits, or to those deposits made in violation of Section 4295, General Code, and which do not come within the terms and meaning of the bond. The sole authority for the designation of a public depository where all the public funds of any municipal corporation may be deposited is derived from statutory provisions. The state Legislature has authorized such a deposit because a higher rate of interest could be received in such a case, which would thus beneficially inure to the good of the public, and the law specifically provided against the bank's failure and for the adequate protection of the public funds by requiring a good and sufficient bond. The failure to comply with the statute has led directly to the loss of the public funds in the hands of the bank at the time of the receivership, for, as stated above, if sufficient security had been taken from the bank to cover deposits as larger deposits were being made by the village from time to time, the village would have had ample protection and security. But the village sustained the loss, (1) by reason of failing to demand additional security; (2) because the village council, in its quarterly accounting with the treasurer, as required by law, failed to discover and never questioned the large balance standing to the credit of the village in the hands of this bank without security.

We are of the opinion that the village is estopped in this proceeding to deny the negligence of its council, its treasurer or any other officer, as such negligence is chargeable directly to the corporation, which can only act through its officers.

In conclusion, it appears that the surety heretofore paid to the village its admitted share of the loss on a basis of \$10,000, that is to say, forty-five per cent. of \$10,000, together with some

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interest, but it appears that this payment was made under a mistake of fact and the surety company in its cross-petition herein asks for equitable relief to the extent of the excess payment made to the village.

As the village had no right under the law to deposit more than \$9,091, we think that the application of the surety is well taken and the prayer of the cross-petition will be granted.

A decree may be submitted finding the equities of the case to rest with the defendant and that the surety company under its bond is obligated to contribute a sum not exceeding forty-five per cent. of \$9,091, together with such adjustment in interest as the facts of the case justify.

**ACTION FOR RECOVERY OF DIVIDENDS PAID OUT OF
CAPITAL STOCK.**

Superior Court of Cincinnati.

SIGMUND RHEINSTROM, TRUSTEE IN BANKRUPTCY OF THE BETT-
MAN-JOHNSON COMPANY, v. LEWIS SEASONGOOD.

Decided, January 12, 1917.

Dividends—Action by Trustee in Bankruptcy Against a Cestui que Trust—For Recovery of Moneys Received as Pretended Dividends, But Really Paid Out of Capital.

One who held shares of capital stock of a corporation in trust for another received payments of money as pretended dividends thereon but which he knew were really paid out of the capital of the company; *held*:

1. In an action against the *cestui que trust* to recover such moneys, the latter can not defend on the ground that he personally acted in good faith and believed the pretended dividends were paid out of earnings.
2. Neither is it a defense to such action that, at the time the payments were made, the corporation was not actually insolvent, nor

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that no *then-existing* creditors were injured, it appearing that the effect of such payments was to hinder, delay and defraud subsequent creditors.

Ben L. Heidingsfeld and Pogue, Hoffheimer & Pogue, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, contra.

PUGH, J.

This case comes up now on the plaintiff's demurrer to the second, third and fourth defenses contained in the amended answer:

I. It has already been decided in this case, both by this court and the United States District Court, that, on the allegations of fact appearing in the petition, this is an action at law, in *quasi-contract*, wherein the trustee seeks to recover money taken from the treasury of the bankrupt corporation by two of its officers, without the consent or authority of the corporation itself and paid over without consideration to the original defendant in the case, Lewis Seasongood, now deceased, and a general demurrer to the petition was therefore overruled.

The court is now asked to reverse its former decision on the authority of the case of *Ratcliff v. Clendenin*, 232 Fed. Rep., 60, recently reported. Reference to this case shows that it relates solely to transactions wherein the corporation itself, or what is held to be the same thing, an officer exercising the functions of the corporation by the permission and acquiescence of all the stockholders, paid so-called dividends out of the capital to an individual stockholder. The facts present no analogy to those stated in the petition in this action. On the contrary, it is expressly alleged in this instance that the money was paid without the authority and without the consent of the corporation, and it nowhere appears in the petition, nor can it be inferred from any allegation therein, that the two officers who are alleged to have made the payments were or had ever been exercising the corporate functions with the knowledge, permission or acquiescence of those concerned.

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II. The second defense states that the entire capital stock, preferred and common, was owned by the representatives of Samuel J. Jhonson, Morris L. Bettman and the original defendant herein, Lewis Seasongood, and that, from the creation of the company, November 1st, 1907, until it went out of business, August 1st, 1913, the business "was wholly managed and controlled and all its corporate powers were exercised by said Morris L. Bettman, *with the acquiescence of all the officers and stockholders of said corporation.*"

In addition, it is alleged that the aforesaid Lewis Seasongood was induced to invest \$200,000 in the preferred stock of the corporation "by the representations of the said Bettman that the said corporation was prosperous and its business profitable," and received the sums of money paid him as dividends in good faith and belief that "he was lawfully entitled thereto."

There is nowhere in this second defense any denial of the allegations contained in the petition further than such as is implied in the averment above quoted as to the exercise of the corporate powers by said Bettman with the consent of all concerned. In testing the sufficiency of this defense, therefore, it must be read in connection with the allegations of the petition. Thus considered, we get the following additional allegations of fact:

1. The \$200,000 of stock in question was not issued to Lewis Seasongood, but to his son, Albert Seasongood, and remained in the name of the latter at all times;

2. Albert Seasongood, during the time of the transaction mentioned, was vice-president and treasurer of the corporation and a director thereof;

3. The payments of the pretended dividends were made to Lewis Seasongood by Albert Seasongood and Morris Bettman.

It results from the above, that Albert Seasongood held the stock as trustee for his father, Lewis Seasongood, and having been at the time the payments were made also the vice-president and treasurer and a director of the corporation, he must be presumed, at least in the absence of a positive averment to the

contrary, to have known the financial status of the company, namely (as alleged in the petition):

“that no dividends * * * had been declared or made by the board of directors of said company; that at the dates of the payments aforesaid, said company was heavily indebted and there were no funds of said company out of which a dividend could have been legally paid or declared; that at all times herein complained of there were no surplus profits earned by said company, or any moneys or funds of said company out of which dividends could have been paid or declared legally thereon; that said sums paid to the defendant as hereinbefore set forth were paid out of the capital of said company and in diminution thereof while said company was heavily indebted, and were without consideration and void and in fraud of the corporation and its creditors.”

✓ As the trustee had this knowledge, it is imputed to the *cestui que trust*, and the fact, if such it be, that the latter did not personally have notice of the wrongdoing of his trustee is immaterial. The *cestui* can not be permitted to enjoy the benefits of a wrong committed in his behalf, upon the plea that he personally knew nothing of it, when it appears that his trustee committed the wrong for his advantage. The case cited by counsel ✓ for defendant in their brief on this demurrer, *Ratcliff v. Clendenin*, 232 Fed. Rep., 60—the only case referred to and obviously the decision on which they rely—has no application to a transaction wherein the payments of pretended dividends were made to one who, actually or constructively, had notice of their illegality.

✓ Albert Seasongood, vice-president, treasurer and director of the corporation, was also trustee of stock of the company which he held for Lewis Seasongood; as an officer with notice of its financial condition, he knew that the corporation, while perhaps not actually insolvent or bankrupt, was none the less heavily in debt; as officer aforesaid, he, with Morris Bettman and other ✓ officers of the company, took possession of over \$64,000 of the capital and paid it to his *cestui que trust* as “pretended dividends.” When the corporation thereafter became bankrupt,

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and the *cestui que trust* is sued by the trustee to recover this money, he defends on the ground that the other stockholders, as well as the officers of the corporation, knew of and consented to the payment; that at the time of payment, though heavily indebted, the corporation was not actually insolvent, though it is now bankrupt; and that while the corporation was forbidden by positive law to make this payment, no *then existing* creditors were injured in this particular instance, and, therefore, he ought not to be required to return the money to the representative of the bankrupt corporation.

The court, in the absence of controlling decisions, is not prepared to hold that such a defense is sufficient in law. The payments were unlawful and without consideration and made to one with notice of the facts. It may be that no *then existing* creditors were harmed, but it is impossible to say that injury was not inflicted upon those who thereafter dealt with the company upon the assumption, which they had a right to entertain, that the capital of the corporation was intact or at least had not been illegally given away to stockholders.

III. As it is admitted by counsel for the defendant that the third defense is insufficient in law, and as the court concurs in this opinion, no discussion of this defense is required.

IV. The question raised by the fourth defense as to whether there is a defect of parties defendant, has already been passed upon in this case, and, upon reflection, the court adheres to its former ruling.

It follows that the demurrer to the second, third and fourth defenses in the amended answer must be sustained.

**JURISDICTION WHERE COUNTY BOARDS OF EDUCATION ARE
UNABLE TO AGREE.**

Common Pleas Court of Greene County.

BOARD OF EDUCATION OF CLINTON COUNTY V. BOARD OF
EDUCATION OF GREENE COUNTY.

Decided, March 1, 1917.

Schools—Transfer of Territory from One County to Another—Respective County Boards Unable to Agree Upon a Division of Funds and Indebtedness—Common Pleas Court Without Jurisdiction to Act in the Matter.

Where more than 75 per cent. of the electors have filed their petition with the county board of education, and such board of education had duly made a transfer according to the provisions of Section 4696, and the boards of education affected thereby are unable to make an equitable division of the funds or indebtedness, a court of equity is without jurisdiction to act and determine a division of the funds or indebtedness in order to make such transfer effective. In the absence of any provision that in case the boards could not agree that either board would have the right to bring a proceeding in the court of common pleas to have the same determined, the court would be without authority to act.

S. L. Gregory and Hayes & Hayes, for plaintiff.

F. L. Johnson, contra.

KYLE, J.

This case is an action of the Clinton county board of education against the county board of education of Greene county, by reason of the fact that the two boards are unable to agree to a division of the funds and indebtedness under the provisions of Section 4696 (106 O. L., page 396), to make effective a transfer of territory from Jefferson township, Greene county, to Liberty township, Clinton county.

It would appear that all the proper steps have been taken and that more than seventy-five (75) per cent. of the electors

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of the territory sought to be transferred petitioned for such transfer, and it thereby became mandatory upon the Greene county board of education to make such transfer, and that such transfer was made by the act of the board as provided by statute.

The statute further provides:

“No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board, and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer.”

From the evidence it appeared that the two boards had one or two joint meetings. I know of no provision authorizing a joint meeting of the boards, and any such meeting would not be authorized for the parties stand in adverse character and are each to act independently of the other in their negotiations.

There is a bonded indebtedness on the Jefferson township rural school district amounting to \$50,000, and some funds on hand—a small amount, approximately \$2,700.

The Greene county board of education proposed that an equitable division of the indebtedness would be for the district transferred to pay their proportionate share of the outstanding bonded indebtedness. This was refused by the Clinton county board, and no counter proposition was made by them, as appears from their record.

The authorities cited in the Wisconsin reports indicate what may be considered as assets and how a division should be made when territory is detached.

The principal question is: Has the court jurisdiction under the facts presented to entertain this action?

The provision for the constitution of centralized schools and the transfer of territory from one district to another is purely statutory, and in order to make effective such transfer the statute must be looked to for authority, and it provides that it shall only be effective when the county boards of education have

passed resolutions for an equitable division of the funds or indebtedness.

In this case it is claimed that the boards can not agree. From the evidence it would seem there had only been one proposition by the Greene county board, and that was rejected, and no alternative or counter proposition was made by the Clinton county board.

But suppose there had been negotiations. The statute makes no provision for any other tribunal to determine what would be an equitable division of the funds or indebtedness, and for the court to assume to act and settle and determine a division of the funds, or indebtedness, would be going beyond the statute and would be unauthorized. In the absence of any provision that in case the boards could not agree that either board would have the right to bring a proceeding in the court of common pleas to have the same determined, the court would be without authority to act. Therefore, my conclusion is that this court is without jurisdiction to intervene, and the court will find that this case should be dismissed for want of jurisdiction. An entry may be drawn accordingly.

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VALIDITY OF AN ELECTION TO TAKE UNDER A WILL.

Common Pleas Court of Pickaway County.

HANNAH L. WARD v. J. H. SARK AND G. W. MORRISON, EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF JAMES WARD, DECEASED, ET AL.

Decided, January Term, 1917.

Widow Who Elects to Take—Without Being Adequately Advised by the Probate Judge—Not Estopped from Denying an Election—Nor do Conduct or Declarations Bind Her—Where Not Based on Full Knowledge as to Her Rights.

1. A widow is not estopped from denying that she in fact elected to take under the will of her deceased husband, or from asking that an alleged election by her be canceled and set aside, where the probate judge did not at the time of said election explain to her the provisions of the will and her rights, both thereunder and by law, in the event of her election or refusal to elect to take.
2. Nor do her declarations, conduct or actions amount to an election to take, where it is not shown that she was acquainted with the contents of the will, or that she knew the benefits flowing to her under the will were less liberal than the law would give her, or because for a time she recognized the will and accepted benefits thereunder, where it appears that she had very little knowledge as to the value of her husband's estate or as to the disproportionate share given her by the will.

Bennett Westfall, for plaintiff.

Barton Walters, contra.

CURTAIN, J.

Two questions are presented for determination in this case, viz.:

1st. Did the plaintiff, on the 19th day of November, 1912, make an election, such as is contemplated by the statutes of Ohio, to accept the provisions made for her by the will of her husband, James Ward?

2d. If not, has she by her declarations, conduct and actions, estopped herself from denying that she made such election?

The plaintiff admits that on November 19th, 1912, she appeared in the Probate Court of Pickaway County, Ohio, being the same day that the will of her husband, James Ward, was admitted to probate in said court, and signed a paper writing of which the following is a copy:

“PROBATE COURT, PICKAWAY COUNTY, OHIO.

“In the Matter of the Will of James Ward, deceased. No. ——. Election of Widow.

“I, Hannah Louise Ward, widow of James Ward, late of Harrison township, Pickaway county, Ohio, deceased, having had explained to me, by the probate court of said county, the provisions of the will of said decedent, the rights under it, and by law in the event of a refusal to take under the will; hereby elect to take the provisions made for me in the last will and testament of said James Ward, deceased, in lieu of being endowed of the lands of my deceased consort, and taking the distributive share of his personal estate.

“HANNAH L. WARD,

“*Widow of James Ward, deceased.*

“Signed in open court this 19th day of November, A. D. 1912.

“A. R. VAN CLEAF,

“*Probate Judge.*”

The plaintiff's claim is, and she so testifies, that at the time she signed said paper writing that she did not know what the legal effect thereof was; that she did not know what was allowed to widows under the laws of Ohio; that she did not know the value of the several items allowed to her by the will of her husband, that she did not have any information as to the value of her husband's property; that although the will of her husband was read in her hearing before she signed said paper writing, she did not comprehend or understand the provisions made therein for her; that the probate court did not at or prior to, the time she signed said paper writing explain and inform her as to her rights under the law or under the will of her husband.

Section 10570 of the General Code of Ohio provides that:

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“On the application by a widow * * * to take under the will, the court shall explain its provisions, the rights under it, and by law in the event of a refusal to take under the will.”

Section 10573 of the General Code imposes the same duty upon a commissioner appointed by the court to take the election of persons unable to appear, or who are non-residents. In such case the duty imposed is mandatory, showing a settled purpose on the part of the Legislature to safeguard the rights of that class of persons required to elect, whether to take under a will or under the law.

Did the probate court, in this case, perform the duty enjoined upon it by Section 10570? The presumption is that it did. *Bank v. Telegraph Co.*, 79 O. S., 100.

The paper writing signed by the plaintiff declares that it did. This paper writing, however, the plaintiff, in order to make an election, was not required by the statute to sign. The only direction as to the manner in which an election shall be made is contained in Section 10571, which provides that: “The election of a widow or widower to take under the will shall be entered upon the minutes of the court.” The paper writing signed by the plaintiff was an admission by her against her interests but which she has the right to explain. *Thompson's Ohio Trial Evidence*, Section 309.

Its only effect, therefore, is to reflect upon the weight that should be given to her evidence. Giving to her evidence the weight that I believe should be given, in view of the admissions contained in said paper writing, and considering the same in connection with the evidence of David Ward, George Grooms, Mary Foust, J. H. Sark and G. W. Morrison, all of whom were present at the time the plaintiff signed said paper writing, I think that it is clear that the probate judge did not advise and instruct the plaintiff as he was required to do by the terms of said Section 10570. This leads to the inquiry as to the effect of the failure of the probate court to instruct the plaintiff, as required by Section 10570.

That it was the intention of the Legislature that a widow, or widower, required to elect should have ample opportunity to

become advised, before making the election, is apparent from the provisions of Section 10567, which gives the right to file a petition in the common pleas court asking a construction of the provisions of the will "in her or his favor and for the advice of the court, or the proper appellate court on appeal therefrom"; and that the advice given should be with knowledge of the value of the provisions made by the will, and the value of their rights under the law, is recognized by Section 10574 of the General Code, relating to an election by persons *non compos mentis*, where it is provided that the court "shall appoint some suitable person to ascertain the value of the provisions made for such widow or widower in lieu of the provisions made by law in the estate of the deceased consort." The next section, 10575, only authorizes the election to take under the will, in such a case to be made "after the court is satisfied that the provision made by the testator for the widow or widower, in the will, is more valuable and better than the provisions by law."

In the case now under consideration the widow was present in the probate court, and the probate judge, in person, assumed to enter an election for her to take under the will of her deceased husband, without having explained to her the provisions of said will, her "rights under it, and by law in the event of a refusal to take under the will." Does this constitute a binding statutory election on the part of the widow? This precise question does not appear to have been directly decided in this state. In the case of *Mellinger v. Mellinger*, 73 O. S., 221, it was decided that:

"1. The duties enjoined upon the probate court by Section 5964, Revised Statutes, are judicial duties and can not be performed by a deputy clerk of said court.

"2. A deputy clerk of the probate court is without right or authority to receive the election of a widow or widower to take under the will of a deceased consort; and an election made before such deputy clerk, and entered of record, may, on application of the party making it to a court of equity, be vacated and set aside."

The election entered in that case was, with the exception of the names of the parties, in almost the identical language of the

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election entered in this case. In that case it will be observed that the election was held to be void because it was taken by a person who did not have the statutory authority to receive it. In this case the election was taken by an officer authorized to receive it, only after the performance by him of the duties enjoined upon him by Section 10570 of the General Code. Those duties he did not perform, and he had no authority to receive the election until they were performed. In the case of *Millikan v. Welliver*, 37 O. S., 461, the second paragraph of the syllabus is as follows:

“2. In order to bar a widow of her right to dower and to such share of the personal estate of her husband as if he had died intestate leaving children, her election must be made either by matter of record in the proper court as required by statute, or actually and in fact under such circumstances as would create against her an estoppel of her right to claim under the law.”

In the case of *Mellinger v. Mellinger*, *supra*, Judge Crew, in delivering the opinion of the court on page 228, used the following language:

“While there is no allegation in the amended petition of Anna Laura Mellinger in this case that she was intentionally deceived or misled, or that information as to her rights was purposely concealed or withheld from her, yet the fact remains, and is within the finding of the circuit court, that whatever election was made by said Anna Laura Mellinger in the Probate Court of Columbiana County, was made by her in ignorance of her rights in the estate of her deceased husband under the law, in the event she refused to take under the will. Before making her election she was entitled to the fullest information as to the provisions of said will, her rights under it, and under the law, in the event of her refusal to take under the will; and it was the imperative duty of the probate court to advise and inform her touching these matters. Election necessarily involves choice, and intelligent choice involves a knowledge both of the facts and the law applicable to the subject-matter, with reference to which a choice is to be made. And where, as in the present case, an election is made by the widow, without full knowledge of the condition of the estate, and of her rights, but in ignorance of both, it can not, as a matter of fact, be asserted that she has made any choice or election.”

It is said that the foregoing language was not necessary to the determination of that case. Be that as it may, the language is applicable to the facts of the case at bar, and it states clearly and concisely what I believe to be the law as stated by the text-writers and in the adjudicated cases where the facts are similar to the case above.

In the case at bar the evidence shows that the paper writing, a copy of which is set forth in plaintiff's petition, was signed by the plaintiff without full knowledge of the condition of her husband's estate; and of her rights, under his will and under the law, it can not, as a matter of fact, be asserted that she has made any choice or election.

It therefore remains to determine whether or not the plaintiff has made an election, "actually and in fact under such circumstances as would create against her an estoppel of her right to claim under the law."

The facts upon which defendants base their claim of estoppel by an election in fact on the part of the plaintiff are alleged in the second defense of their answer. It is therein alleged, in substance, among other things, that at the time the plaintiff signed the paper writing, a copy of which is set forth in her petition, that the probate court explained to and advised her of her rights both under the will and under the law, and that she then signed said paper writing and thereby accepted the provisions made for her by the will. I have heretofore, in this opinion, found that these averments are not supported by the evidence. Therefore they can not be considered in support of the other allegations contained in the second defense of the answer.

It is further averred in said second defense that:

"Plaintiff was acquainted with the contents of said will long prior to the death of said James Ward, her husband, and all the while knew the provisions made therein for herself, and after the death of her husband, and prior to the probate of said will, declared her satisfaction with said will and the provision therein made for her, and declared her intention to accept the same and to elect to take under the said will, although she then knew that the law made a more favorable provision for her."

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The averments in the above quoted paragraph of the answer that the plaintiff was acquainted with the contents of the will in question and the provision made therein for her, prior to the death of her husband, and that after his death and before the probate of the will, "she then knew that the law made a more favorable provision for her," I find are not supported by the evidence.

It is further alleged, in substance, in said answer, that the defendant on the 29th day of May, 1913, leased to one George Conrad 157 acres of the land devised by said testator for the term of one year, beginning March 1st, 1914, and that said Conrad has taken possession thereunder. No act is charged against the plaintiff in this connection. The only claim made in reference to this is that the defendants would not have made this lease had the plaintiff not in fact elected to take under the will. This allegation is not, therefore, an allegation of an estoppel fact against the plaintiff.

The balance of the allegations contained in the answer consists, viz., of the recitals, of payments of money made by defendants to plaintiff, under the provisions of said will, at different times, between the date of the probate of the will and the commencement of this action and of claims of ownership made by her to certain properties under the will, and of certain benefits received by her under the will. The total amount, approximately, alleged to have been received by the plaintiff was \$1,081.66. Do these facts, if admitted to be true, estop the plaintiff from claiming that she did not in fact elect to take under the will of her husband? The third paragraph of the syllabus of the case of *Millikan v. Welliver* is as follows:

"3. Where it does not appear that a widow has acted with a full knowledge of the condition of her husband's estate and of her rights under the will and under the law, her acts in paying the debts of the husband out of his money, receiving and holding the balance, and having possession and control of the real and personal estate for five months after her husband's death, do not constitute such election, in fact, to take under the will, as estops her from claiming, under the law within the time allowed."

In that case the widow died without having made an election under the statute and before her time therefore had expired, and it was claimed that by reason of certain acts and conduct on her part that she had in fact made an election and that she was estopped from denying the same. In this case the widow, within the time allowed her by law, assumed to make an election under the statute, which I have held was not a legal statutory election. It is now claimed that although it be true that she did not make a legal statutory election, that by reason of her having recognized the will of her husband for the length of time shown by the evidence, and having received the benefits thereunder, already referred to, that she did in fact elect to take under said will, and that she is now estopped from claiming otherwise.

In *Pomeroy's Equity Jurisprudence* (3d Ed.), Volume 1, Section 512, the author says:

“Subject to the limitation as to time (enacted by the statutes of various states), it is a well settled rule of equity that a person bound to elect has a right to become fully informed of and to know all the facts affecting his choice, and upon which a fair and proper exercise of the power of election can depend. To this end he has a right to inquire into and ascertain all the circumstances connected with the two properties, that is, his own and the one conferred upon him, and especially their relative condition and value; and he will not be compelled to elect until he has made, or at least has had an opportunity to make, such an examination as enables him to learn the truth. It follows that where an election has been made in ignorance or under a mistake as to the real condition and value of the properties, or under a mistake as to the real nature and extent of the parties own rights, such a mistake is regarded as one of fact, rather than of law; the election itself is not binding and a court of equitable powers will permit it to be revoked unless the rights of third persons have intervened which would be interfered with by the revocation.”

The decisions in the case of *Millikan v. Welliver* and *Mellinger v. Mellinger*, heretofore referred to, recognize the rule above stated in *Pomeroy's Equity Jurisprudence*. In *Millikan v. Welliver*, 37 O. S., the court in its opinion on page 466 said:

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“In order that acts of a widow shall be regarded as equivalent to an election to waive dower, it is essential that she act with a full knowledge of all the circumstances and of her rights, and it must appear that she intended by her acts, to elect to take the provision which the will gave her. These acts must be plain and unequivocal, and be done with a full knowledge of her rights and the condition of the estate. A mere acquiescence without a deliberate and intelligent choice, will not be an election.”

In *Mellinger v. Mellinger*, 73 O. S., *supra*, the court in its opinion quotes with approval the foregoing paragraph from *Millikan v. Welliver*.

In the case of *Sill v. Sill*, 1st Pac., 556, the Supreme Court of Kansas adopted the foregoing paragraph from *Millikan v. Welliver* as the fifth paragraph of its syllabus in that case.

In *Anderson's Appeal*, 36 Pa. St. Rep., 476, it is held that:

“An election by matter *in pais* can only be determined by plain and unequivocal acts, under a full knowledge of all the circumstances and of the parties rights; one is not bound to elect until he is fully informed of the relative value of the things he is to choose between; and if he makes an election before the circumstances necessary to a judicious and discriminating choice are ascertained he will not be bound.”

In *Re Woodburn's Estate*, 21st Atl. Rep., 16, the Supreme Court of Pennsylvania, January 5, 1891, held that:

“A widow is not bound by her election to take the provision made for her by her husband's will where she was ignorant of her rights under the intestate laws when she executed an instrument of acceptance of such provision, and no explanation was made her of her rights in either case, though she was not in any wise deceived or misled.”

Paxson, C. J., in delivering the opinion of the court in that case on page 17 said:

“The authorities are clear that nothing less than unequivocal acts will prove an election, and they must be done with a knowledge of the party's rights, as well as of the circumstances of the

case. Nothing less than an act intelligently done will be sufficient; she should know, and, if she does not, she should be informed, of the relative values of the properties between which she was empowered to choose. In other words, her election must be made with a full knowledge of the facts. The rule applies with a special force where the widow is called upon, as in this case, to make her election shortly after her husband's death."

A further citation of authorities is not necessary. Neither is it necessary to further examine and comment upon the authorities cited by counsel in this case. It is only necessary to say that I consider that the rule stated in the case of *Millikan v. Welliver*, 37 O. S., 466, heretofore quoted, is the law which should govern in a case of this character.

Applying this rule to the allegations contained in the second defense of defendant's answer, and the facts proven thereunder, heretofore referred to, the question presented is, did Mrs. Ward in making the declarations, doing the acts, and receiving the benefits and payments which she did, as shown by the evidence, act with full knowledge of all the circumstances, and of her rights under the will of her husband and under the law and the condition of her husband's estate?

The inventory of the testator's estate shows that it was of the value of \$99,609, \$33,434 thereof being personalty and \$66,175 being realty. This inventory was not made at the time the plaintiff is alleged to have elected to take the provisions made for her in her husband's will. She testified that she did not know that she ever saw it, or an abstract of it, but she admits that Mr. Sark did tell her about some of the things that were in it. She testifies that she did not obtain any information in regard to it as filed in the probate court until in August, 1913. This evidence is not contradicted. From the cross-examination of the plaintiff it is apparent that she did not, at the time she testified, have any intelligent idea of the value of her husband's estate, either real or personal. She knew that he was the owner of certain real estate, but she did not seem to have any real knowledge of its value and she did not appear to have any intelligent conception of the amount or value of his personal estate. She

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testified that she had no knowledge of the value of the provisions made for her by her husband's will, or of what would have been the value of her rights in her husband's estate under the law. Mr. Sark testified that before the will was probated and before said inventory was made that he explained to plaintiff what the estate consisted of, what she would get under the will and as near as he could at that time what she would get under the law. This conversation is denied by plaintiff. Assuming, however, that Mr. Sark did have the conversation with Mrs. Ward that he testified to, was he then able to and did he give her the information and advice that the law contemplates that she was entitled to before making an election? In substance, Mr. Sark says: "I told her that under the law she would get of the personalty six or seven thousand dollars; that the appraisers would set her off a year's allowance, but that they did not know what it would be; that she would be entitled to one-third of the real estate." On cross-examination he says that he did not suggest to her what would be a fair year's allowance in an estate of about one hundred thousand dollars; that he did not tell her what was the fair rental value of the farm which he, Sark, was to get; that he did not say anything about the rental value of the home place in Ashville; that he did not tell her what would be the value of her annuity under the will; that he did not inform her as to the value of her estate, under the will, in the Ashville property.

I have no doubt but what Mr. Sark did undertake to fairly advise Mrs. Ward as to her rights, but I am of the opinion that at the time he did so that he was not possessed of the proper information to do so and that at that time he did not realize or know what information she was entitled to. Assuming, therefore, that Mr. Sark gave to the plaintiff all of the information which the record shows that he says he did, I am of the opinion that, under the rules of law I have stated, it falls short of what the plaintiff was entitled to receive before being bound by an election. As I have already found, the probate court did not give her the information to which she was entitled, and the evidence fails to show that she received such information from any other source.

While it is not pleaded, it is asserted in argument that J. H. Sark, one of the beneficiaries under the will of James Ward, made certain valuable improvements upon the land mentioned in Items 5 and 6 of said will which he would not have made had the plaintiff declined to elect to take under said will, and that for that reason she should be held to be estopped from denying that she in fact did elect to take under said will. I will not consider the question of the failure to plead these facts as an estoppel; for if I found the facts proven sufficient to create an estoppel, I would permit Mr. Sark to be made a party, in his individual capacity, and would give him leave to file an answer setting forth such facts.

Item 5 of the will provides that:

“In renting the real estate now occupied by J. H. Sark in Walnut township, Pickaway county, Ohio, consisting of 300 acres, more or less, I direct that he be permitted to continue to rent and occupy the same at an annual rental of twelve hundred dollars, and the further consideration that he make all improvements and repairs at his own expense.”

By looking at Item 6 of the will we find that the testator did not intend that Mr. Sark should have any other interest in said lands than that of tenant until after the death of the plaintiff, or after five years from the death of the testator. Neither of these events had happened at the time Mr. Sark made the improvements referred to, and they have not yet happened. He, as tenant, held possession of said premises, under the will, at the time he made said improvements, and it was his duty under the terms of the will to “make all improvements and repairs at his own expense.”

By Item 6 of his will the testator directs his executors, after the death of his wife, or five years after his death, to sell said farm to Mr. Sark for a certain sum and on certain conditions. He does not devise it to him. He simply gives Mr. Sark the option of purchasing it. That he may decline to do, or be incapacitated from doing. In any event at the time he claims to have made said improvements, he had no vested interest in

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said lands other than that as tenant, and he must be presumed to have made the improvements that he did make under the obligations imposed upon him by the will.

As already indicated it is charged that the plaintiff has received certain benefits and sums of money under the will. Under the law, as widow, she was entitled to the use of the mansion house for a year. Under the will it was the duty of the defendants to keep said premises in repair, irrespective of the election of plaintiff to take under the will. Therefore, the items for wiring the house and placing electric fixtures therein and fencing said premises should not be charged against the plaintiff. There is an item for linoleum, about which there is a dispute, but I am of the opinion that the evidence fails to show that the purchase of this article was completed during the lifetime of James Ward. Without enumerating the several items, it is sufficient to say that all except the two mentioned should be charged to the plaintiff. It is apparent that the plaintiff, if said election is canceled and set aside, and she is permitted to take under the law, will have in the hands of the defendants an amount far in excess of the amounts which I have found that she should be charged and that it will not be necessary for her to return any of the amounts received by her.

Counsel for the executors and trustees in the brief say:

“The court will not be unmindful of the fact that Mary Foust is given a legacy of \$5,000 under the will of decedent conditioned upon the plaintiff electing to accept the provisions made for her in said will; and since the widow did elect to accept said provisions and thereby vested said bequest of \$5,000 in the said Mary Foust, who is an unprotected and inexperienced girl, having no home except with plaintiff, she should not be deprived of said bequest of \$5,000.”

This matter is not pleaded by the executors and trustees in their pleadings and no pleading has been filed in this action by Mary Foust although she is a party thereto.

If the facts referred to by counsel in their brief create an estoppel in favor of any one it is Mary Foust or some person

claiming under or through her, and to be available as a defense to this action would have to be pleaded by her or some person claiming under or through her. The executors, so far as the record shows, are in law, mere strangers to the question raised by them in their brief.

In *1 Herman on Estoppel*, p. 14, Section 20, it is said:

“There is one general universal rule, applicable alike to estoppel by record, by deed, and to equitable estoppel or estoppel *in pais*, that estoppels must be mutual. Strangers can neither take advantage of nor be bound by an estoppel. Its binding effect is between the immediate parties, their privies in blood, in law, and by estate.”

I, therefore, find that the plaintiff is not estopped from denying that she in fact elected to take under the will of her husband, James Ward, and that said alleged election by her should be canceled and set aside, and that the plaintiff upon settlement with the defendants be charged with the amounts above indicated, and that the defendants pay the costs of this proceeding.

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PURCHASER DECLARED A TRUSTEE UNDER THE BULK SALES ACT.

Common Pleas Court of Cuyahoga County.

THE MOLLEN, THOMPSON & JAMES COMPANY V. B. KLEIN ET AL.

Decided, March 22, 1917.

Bulk Sales—Ohio Act Analagous in Principle to Both the Common Law and Precedent—Privilege of Applying for Order Declaring the Purchaser a Trustee—Open to Any Creditor—Purchaser Not Protected Who Relies on Oral Statement by Seller that He Has No Creditors.

1. The bulk sales statute must be strictly construed in favor of the unpaid seller of merchandise.
2. The right to make application, within ninety days after the sale, for an order declaring the purchaser a trustee accountable to the creditors of the seller is not limited to creditors named in the list furnished to the purchaser by the seller, but is open to any creditor whether his name is included in said list or not.
3. It is the duty of the purchaser to demand and of the seller to furnish a statement under oath showing the exact condition of his business with the names of all creditors, and a purchaser who permits himself to be put off with an oral statement to the effect that he has no creditors is without protection under the statute.

M. C. Portman, for plaintiff.

Julius C. Preyer, contra.

FORAN, J.

This is an action brought under the "bulk sales" act, passed by the General Assembly of this state April 18, 1913, and approved May 5, 1913. (103 O. L., 462.)

By Section 1 of this act, Sections 11102 and 11103 of the General Code were amended, and Section 11103 was supplemented by the enactment of the section known as Section 11103-1. Section 11102, General Code, as thus amended, reads as follows:

"The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fix-

tures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferrer or assignor, shall be void as against the creditors of the seller, transferrer, assignor, unless the purchaser, transferee or assignee demands and receives from the seller, transferrer or assignor a written list of names and addresses of the creditors of the seller, transferrer and assignor, with the amount of indebtedness due or owing to each and certified by the seller, transferrer and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee or assignee shall, at least five (5) days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address appears in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof."

By Sections 11103 and 11103-1 it is further provided that the sellers, under the act, shall include individuals; and that any purchaser who shall not conform to the provisions of the act shall, at any time within ninety days after such sale, upon the application of any of the creditors of the seller, become a trustee to be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment.

Obviously, none but creditors of the seller at the time of the sale are entitled to the provisions of this act or to the remedies provided therein. The clear purpose of the act was or is to protect the unpaid seller of merchandise and goods. The theory of every normal sale of personal property is price as against delivery. But, as was said by Johnson, J., in *Steel, etc., Co. v. Miller*, 92 O. S., 121:

"It is a matter of common knowledge that the business of retail merchandising is conducted largely upon credit. This system came about as a natural outgrowth of the vast increase in the facilities of transportation and communication in modern times. It was not surprising that a system so built up and conducted should be attended with abuses, for it furnished an opportunity for the commission of fraud upon creditors not usual in other forms of business. There was a temptation to sell stocks

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in bulk without providing for the payment of creditors from whom they were bought. It was natural and unavoidable that such an important subject should be called to the attention of the Legislatures and courts.”

Having these facts in view, the General Assembly, on April 4, 1902, passed an act entitled “An act to prevent fraud in the purchase, disposition or sale of merchandise.” (95 O. L., 96.)

By Section 1 of this act it was provided that a sale or other disposition of an entire stock of merchandise in bulk or any portion of a stock of merchandise other than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller, at least six days before such sale or other disposition, shall do certain things which are specifically provided for in the act. Among other things, it was provided that the seller should deliver to the purchaser a full and correct statement of the names, places and residences or places of business of each of his creditors, and the amount due to each; and that he should also deliver to the purchaser true and correct books or original invoices from which the cost price of the merchandise sold could be ascertained. And it was further provided that the seller and the purchaser, together, at least six days before the sale or other disposition, should make a full and detailed inventory showing the quantity and the cost price to the seller of each article to be included in the sale; and that this list of creditors, books, invoices and inventory should be retained by the purchaser for at least six months after the sale and be exhibited on demand to each creditor of the seller; and then the purchaser was required, at least five days before the sale or other disposition in good faith, to give notice of the proposed sale to each of the seller's creditors of whom the purchaser obtained knowledge or could obtain knowledge by the exercise of reasonable diligence, and this notice was to be given either personally or by registered letter properly stamped, directed and mailed.

This act was declared unconstitutional in *Miller v. Crawford*, 70 O. S., 203, for the reason that it is repugnant to the first

article of the Constitution, because it placed an unwarranted restriction upon the right of the individual to acquire and possess property, and, further, because it contained a forbidden discrimination in favor of a limited class of creditors.

Subsequently, the Legislature, on April 30, 1908 (99 O. L., 241), passed an act which in all essential particulars is substantially similar to the language now under consideration or the act under which this action is being prosecuted. This act is substantially embodied in Sections 11102, 11103 and 11104, G. C.

In *Williams & Thomas Co. v. Preslo*, 84 O. S., 328, this act was also declared unconstitutional for the reason that it is repugnant to the first article of the Constitution and therefore void, and *Miller v. Crawford*, 77 O. S., 203, was approved and followed.

The constitutional convention of September, 1912, however, amended Section 2 of Article XIII, relating to the classification of corporations, and at the end of the section these words were added: "Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual."

In *Steele, etc., Co. v. Miller*, 92 O. S., 115, it is provided in the third part of the syllabus:

"The act of April 18, 1913, to amend Section 11102 *et seq*, General Code, relating to the transfer of stocks of merchandise and fixtures other than in the usual course of trade (103 O. L., 462), is a valid enactment not repugnant to the state or federal Constitutions."

Long prior to the enactment of the statutes herein referred to, it was held by the courts of this state, including the Supreme Court, in various decisions, that the unpaid seller of merchandise had a lien upon the goods sold if the sale was tainted by fraud.

The doctrine of stoppage *in transitu* is well known and need not be referred to here. Sales of merchandise purchased by a man in anticipation of insolvency, or who is actually insolvent, have always been held to be fraudulent and void, the courts even going so far as to hold that where one is purposely ignorant

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of the extent of his property, he could not rely upon such ignorance for the purpose of raising an expectation of ability to pay for what he buys. He must be held to have a reasonable knowledge of the extent of his property, so that those dealing with him will not be defrauded by his recklessness and carelessness in business. And it has been held that it is not essential that a purchaser make any fraudulent representation when purchasing goods in order to render the contract of sale therefor void for fraud; want of reasonable expectation of ability to pay, which is the equivalent of an intent not to pay, being sufficient. See *Wilmot v. Lyon*, 49 O. S., 296, also *Talcott v. Henderson*, 36 O. S., 162.

We merely refer to this general principle of law for the purpose of indicating that the bulk sales act was primarily intended and designed to protect the unpaid seller of goods and merchandise. Similar acts have been passed by nearly all the states of the American Union, and all these acts may be said to be supplementary or related acts to the general sales acts, which are largely based on the English sales of goods act, passed in 1893.

The courts have always recognized a distinction between contracts generally and contracts for the sale of personal property. While it is true that a sale of goods is affected by contract, it must be remembered that a completed contract of sale of merchandise is something more, as it is a contract plus the transfer of goods. The essence of the sale involves a transfer of the property for a price, and therefore a contract of sale contemplates an absolute transfer of the goods agreed to be sold; and if the contract of sale be tainted with fraud, this absolute transfer of title does not take place, though the goods be in fact delivered and possession thereof parted with.

These sales acts are in large measure declaratory of the common and precedent law of sales of personal property. One underlying principle may be seen in all of them, and that is to protect the unpaid seller who has parted with the possession of his property, under contract express or implied, where the price is not paid upon delivery.

Referring now to the plaintiff's petition, we have no hesitancy in saying that it does not state a cause of action. No advantage,

however, was taken by the defendant of defects in the petition; and inasmuch as at the time the case was heard certain statements were made by counsel for the defendant which must be treated as admissions, the plaintiff will be given leave to amend his petition to conform to the evidence.

It was agreed by counsel at the time the case was presented to the court that the same should be tried and determined upon an agreed statement of facts. This statement of facts is now before us. A charitable criticism of this statement of facts would be that it is wholly defective, insufficient and characterized obviously by a glaring want of accuracy, conciseness and clarity of statement. From the statement of fact and the petition, however, and an admission in the answer, it appears that prior to December 10, 1914, the defendant, B. Klein, long conducted in the ordinary course of trade a retail grocery store in this city; and that on said 10th day of December, 1914, Klein, for the consideration of \$1,500, sold, transferred and assigned, in bulk, and gave possession of the stock and merchandise of said store, together with fixtures, to the defendant, J. Kraus, otherwise than in the ordinary course of trade and not in the regular and usual prosecution of the retail grocery business. The petition states that the plaintiff is a creditor of B. Klein in the sum of \$57.25, as evidenced by a judgment in the municipal court of Cleveland, obtained on the 20th day of January, 1915. There is no statement in the petition that the plaintiff was a creditor of B. Klein prior to the 10th day of December, 1914, the day on which the store was sold in bulk to the defendant J. Kraus; nor is there any statement, either in the petition of the plaintiff or the cross-petition of the O'Donohue, Knight & Gage Company, that no affidavit was furnished Julius Kraus by the defendant B. Klein. The defendant Julius Kraus, however, in his answer does say that, coincident with the sale to him in bulk of said grocery store of the defendant B. Klein, he did demand an affidavit setting forth the number and names of creditors and of the indebtedness of each so that he might notify them of this sale and transfer as required by law, "and at that time the defendant B. Klein did state that there were no creditors, and for that reason no affidavit was furnished."

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We have here an admission by the defendant Kraus that no affidavit of any kind was furnished to him by the defendant B. Klein. The petition does not so state, nor does the agreed statement of facts. The agreed statement of facts says that at the time of the sale in bulk to Julius Kraus, "the said Kraus demanded of the defendant B. Klein a written list of the names and addresses of the creditors of said B. Klein for the amount of the indebtedness due or owing to each, and certified by B. Klein under oath to be a full and accurate list of the creditors and the amount of indebtedness to each. At that time he was verbally informed by the said B. Klein that there were no creditors, and no such written list of names and addresses of creditors, with the amount of indebtedness owing to each, was furnished said Julius Kraus by the said B. Klein; and the said Julius Kraus did not, at least five days before taking possession of or paying for such merchandise or fixtures, personally or in writing, notify any of the creditors of the transfer and sale in bulk of the said stock of merchandise and fixtures."

It therefore clearly appears that the defendant B. Klein, knowing he was indebted to various parties in the sum of about \$750 on the 10th of December, 1914, on that day sold his store in bulk, and not in the regular and usual prosecution of business nor in the ordinary course of trade, and at the time he sold and transferred said store to the defendant Julius Kraus he informed the said Kraus that he had no creditors or that there were no creditors; and if this statement was true, of course it was not necessary for him to furnish the said Kraus with a written list of the names and addresses of creditors; and obviously he could not do so, for if there were no creditors there could be no names of creditors.

Taking this statute as we find it, and the legislation that preceded it, to which reference has been made, and the adjudications of our Supreme Court upon such legislation, it must be held, as has been already intimated, that the purpose of this law or this act was or is to protect the unpaid sellers of merchandise; that is, the unpaid creditors of the dealer who sells his business in bulk. The statute in express terms provides that the thing now required to be done, with respect to the sale of an entire

stock of merchandise other than in the usual or ordinary course of trade, is that the purchaser shall demand and the seller furnish, under oath, a complete and accurate list of his creditors and of the amount owing to each; and that the buyer shall, at least five days before the completion of the sale, notify each of the creditors and any others of whom he may have knowledge, personally or by registered mail, of the proposed sale and of the price, terms and conditions thereof.

That the construction to be given this statute is not forced we think is evident from the case of *Pittsburg Plate Glass Co. v. Ring*, decided by the court of appeals February 23, 1915. The defendant in that case purchased the entire stock of merchandise in bulk. He received from the seller a written list of names and addresses, which list, however, did not contain the name of the plaintiff in error, who was a creditor of the seller. The defendant in error notified in writing those whose names appear in the list, as the statute provides. The name of the plaintiff in error not being included in the list, it was not notified, and was not informed of the sale until some time after it was consummated. The defendant in error, that is, Saul Ring, paid the purchase price and took possession of the property within twenty-four hours of the time of the purchase. It was held by the court of appeals, Meals, J., that because Ring took possession of the merchandise before the expiration of five days from the date of the purchase, the defendant in error, Saul Ring, was subject to the provisions of the bulk sales act, and he was held to be a trustee of the goods purchased for the benefit of all the creditors. In speaking of the right of creditors to make application within ninety days after the purchase, and that the purchaser becomes a trustee, and to be held accountable to all the creditors, the court said :

“The right to make such application is not limited to the creditors named in the list by the seller, but is given to any creditor of the seller. So if the purchaser takes possession of the goods and pays therefor before the lapse of five days from the giving of the notice required by the statute, any creditor, whether named in the list or not, may make the application provided for in the statute.”

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In other words, the court of appeals held that this statute must be strictly construed for the benefit of the unpaid seller of merchandise.

It is said in the agreed statement of facts that, "at the time of and coincident with the sale in bulk of said grocery business, the said Julius Kraus did demand of the said B. Klein a written list of the names and addresses of the creditors of the said B. Klein." And it is admitted or stated that he did not, five days before taking possession of or paying for the merchandise or fixtures, notify any of the creditors of the sale to him. Of course, if there were no names of creditors furnished, it would necessarily follow that he could not notify creditors. This statement, taken in connection with certain statements informally made to the court by counsel for the plaintiff and the defendant, indicates that the defendant Julius Kraus took possession of the store immediately after the sale had been consummated. In other words, he did not wait five days for the purpose of notifying creditors because there were no creditors to be notified. When the matter was before the court it was not denied, if not expressly admitted, by the defendant Kraus that such possession was immediately taken. Therefore there was no compliance with the statute, and no valid sale or transfer of the property took place.

The query now arises, is this statute complied with where the seller verbally says to the purchaser, "I have no creditors; I do not owe any person and am not indebted to anybody at this time, therefore I have good right to sell and dispose of these goods"?

To answer this question in the affirmative would be to nullify this statute. It would open the door wide to fraud of the grossest kind. A man, in anticipation of insolvency, might select another as dishonest as himself and make such a statement, and the creditors would be wholly without remedy. If Julius Kraus was not a purchaser in good faith and for value, then, irrespective of the statute, he ought to be held to be the trustee of the creditors, or to hold the goods for their benefit.

Assuming, now, that Julius Kraus was acting in entire good

faith, what should he have done before he accepted these goods or paid for them?

We hold that he should have demanded from the defendant B. Klein a statement, under oath, of the exact situation and condition of his business; and that the statute must be construed to mean that such a statement, under oath, must be furnished to the buyer. If B. Klein stated verbally, as the agreed statement of facts says, to Kraus that he did not have any creditors and that he did not owe anything upon the goods, Julius Kraus should have demanded that that statement be reduced to writing and be sworn to.

While the doctrine of *market overt* does not prevail in the United States, and while it may be said in general terms that there is no law recognizing the effect of sales in *market overt* in any of the United States, yet the doctrine of *caveat emptor* has a limited application in the United States, and a purchaser of personal property is under obligation to examine and judge for himself as to the title and quality of the goods purchased, unless he is persuaded from so doing by the representations of the seller; and if Kraus was acting in entire good faith, he should have demanded of the defendant Klein the statement provided for in the statute. As has been said, the statute would be a nullity and would wholly fail in its objects if a purchaser in bulk, not in the usual or ordinary course of trade, did not require of the seller a statement under oath as to the condition of the business. And when the statute provides that the purchaser must demand and receive from the seller a written list of names and addresses of creditors, "under oath, to be a full, accurate and complete list of his creditors and of his indebtedness," we think it necessarily follows that a statement under oath must be made; as it is the only protection the purchaser has; he is buying at his peril; he is the man who must beware and take notice of what he is doing. We think any other holding or any other construction of this statute would render the whole statute futile and nugatory. In saying this we are assuming, now, that the defendant Julius Kraus was acting in entire good faith. If he was not acting in good faith, and was in collu-

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sion with the defendant B. Klein to defraud the creditors of B. Klein, then, of course, there was no valid sale to him, and he holds the goods as trustee for the benefit of the creditors of B. Klein.

The petition, of course, raises no such issue. Indeed, the petition does not state in exact terms that at the time of the sale to Julius Kraus the defendant B. Klein was indebted to the plaintiff. The statement in the petition is that he obtained a judgment in the municipal court on the 20th day of January, 1915, against the defendant B. Klein. This was forty days after the sale; and for aught that appears, the debt, claim or demand of the plaintiff against the defendant B. Klein might have arisen after December 10th, 1914. And the same may be said with respect to the cross-petition of the O'Donohue, Knight & Gage Company, as it seems that they obtained their judgment in the municipal court on the same day, that is, January 20, 1915.

In the interest of justice, however, we are inclined to hold that the plaintiff and the cross-petitioner may amend their pleadings to conform to the evidence before the court; and we are free to say that that evidence is not wholly contained in the agreed statement of facts, as that is as defective and as incomplete as the pleadings, but the pleadings and statement of facts are supplemented by statements made in open court admitting that the plaintiff and the cross-petitioner were creditors of the defendant B. Klein before he sold his grocery store, and that their debt and demand arose for goods and merchandise sold and delivered to B. Klein before the store was sold.

There is a statement in the agreed statement of facts to this effect: "That the said judgment and costs are now due and unpaid, and that the goods were purchased in the conduct of said grocery store by B. Klein."

We might hold, by construction, that this was intended to state that the judgment was for goods and merchandise sold to B. Klein before the sale of the store by him to the defendant Kraus, that is, before December 10th, 1914; but this is not the statement either in the petition or in the agreed statement of facts; and for aught that appears, it might be that B. Klein,

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even after he sold the store to the defendant Julius Kraus, purchased the goods from the plaintiff and the cross-petitioner as the agent of Julius Kraus. But, as has been said, in the interest of justice, the plaintiff and cross-petitioner will be permitted to amend their pleadings to conform to the facts; and the plaintiff and cross-petitioner may have an order to the effect that the defendant Julius Kraus shall be held the trustee for the creditors, and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that came into his possession by virtue of the sale of December 10th, 1914; and that a receiver will be appointed to take possession of said goods.

**LIMITATION OF RECOVERY FOR INJURIES GROWING OUT OF
AN AUTOMOBILE ACCIDENT.**

Common Pleas Court of Hamilton County.

**WALTER L. KLEIN ET AL V. THE EMPLOYERS' LIABILITY
ASSURANCE CORPORATION, LTD.**

Decided, February 1, 1917.

Insurance Against Accident—Indemnity to an Insured for Causing Bodily Injuries or Death—Does Not Cover Injuries of the Character Sustained by a Husband—By Reason of Bodily Injuries Sustained by His Wife When Struck by the Automobile of the Insured—Interest on Judgment Recovered—Expenses Incurred by Insured Including Cost of Trial.

1. An insurance policy, indemnifying the assured against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death therefrom, accidentally suffered by any person or persons by use of an automobile named in the schedule of the policy, containing the condition that, "The corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to five thousand dollars (\$5,000), and subject to the same limit for each person, the corporation's total liability on account of any one accident result-

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ing in injuries to more than one person, including death, is limited to ten thousand dollars (\$10,000)," limits the liability of the company to \$5,000, where the wife has sustained bodily injuries and has recovered a verdict of \$5,000, and the assured, who was called upon to pay a judgment of \$4,000, recovered against him by the husband of the wife for medical services and loss of wife's services, can not recover under the ten thousand dollar clause in such policy. The word "injuries" under the ten thousand dollar clause refers to "bodily injuries," and the loss of services sustained by a husband, although "injuries," in the general sense of the word, are not such injuries as are contemplated by the word as used in the policy sued upon.

2. The liability of the company for judgment recovered against the assured is limited to \$5,000, and by the weight of authority interest on such judgment pending error proceedings can not be recovered by the assured.
3. The company is liable for all expenses resulting from claims upon the assured on account of bodily injuries, and the costs of a second trial incurred by the assured must be borne by the company where the company did not in fact pay the full amount of its liability as ascertained by previous judgments.

Kramer & Bettman, for plaintiffs.

Worthington, Strong & Stettinius, contra.

MAY, J.

Opinion overruling motions for new trial.

The plaintiffs in this case were the executors of the estate of Samuel Klein, who was the assured in a policy issued by the Employers' Liability Assurance Corporation of London, England. By the terms of that policy the corporation agreed to indemnify the assured against loss from liability imposed by law upon the assured for damages on account of bodily injuries suffered by any person or persons by means of the maintenance or use of any automobiles named in the schedule of the policy, subject to the following conditions:

"Condition A: The corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to five thousand dollars (\$5,000), and subject to the same limit for each person, the corporation's total liability on account of any one accident resulting in injuries to

more than one person, including death, is limited to ten thousand dollars (\$10,000).”

The policy also provided that the company would pay all expenses resulting from claims made upon the assured on account of bodily injuries. And in condition E of the policy it was provided:

“No action shall lie against the corporation to recover for any loss or expense under this policy unless it shall be brought by the assured, for loss or expense incurred and paid in money by the assured, after trial of the issues.”

During the lifetime of Samuel Klein and while the policy was in full force and effect, Samuel Klein’s automobile injured Jennie Goldstein. Two suits were immediately begun against Samuel Klein, one in the common pleas court, numbered 145156, by Daniel Goldstein, for medical expenses and loss of services, and one for \$35,000 in the superior court, numbered 54664, by Jennie Goldstein, for personal injuries. The corporation defended both suits. In the common pleas court Daniel Goldstein recovered a judgment for \$4,000, and in the superior court Jennie Goldstein recovered a judgment for \$12,000. Error was prosecuted in both cases. The Supreme Court affirmed the Daniel Goldstein \$4,000 judgment and reversed the Jennie Goldstein \$12,000 judgment. At the time of the reversal, the judgment of Daniel Goldstein against Klein, with interest, amounted to more than \$5,000, and the company offered to pay this amount to the executors of Klein, who had died pending the error proceedings in the Supreme Court. The company, however, did not comply with condition D of its policy, namely, elect to settle the same or to pay the assured the indemnity provided for in condition A thereof, in which case the corporation shall not be liable for any further expenses after such payment shall have been made.

The attorneys for the executors notified the company that they would look to the company for expenses incurred in the second trial of the Jennie Goldstein case. Upon the second trial of that case Jennie Goldstein recovered a \$5,000 judgment.

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On April 28, 1915, Samuel Klein's executors paid both the Daniel Goldstein judgment, which at that time amounted to \$5,098, and the Jennie Goldstein judgment, which at that time amounted to \$5,057.48, and \$220.09 court costs in the Daniel Goldstein case, and \$144.55 court costs in the Jennie Goldstein case, and \$87 expenses incurred for medical experts and stenographers's fees in the second trial of the Jennie Goldstein case, and in this action are now seeking to recover from the defendant corporation, under the policy, \$10,597.12.

The defendant corporation in its answer sets up the conditions of the policy and disclaims any liability beyond \$5,000, the amount stipulated in the policy, and the court costs in the Daniel Goldstein case and the first Jennie Goldstein case, and on July 30, 1915, the corporation made a formal offer to the plaintiff to confess judgment for \$5,670 and all costs in this suit incurred to date.

The main question in this case is the construction of the policy.

Counsel for the executors urge with much conviction that under the condition of the policy Klein was entitled to recover \$10,000, because he was called upon to pay, not only the judgment for bodily injuries sustained by Jennie Goldstein, but for medical expenses and loss of service, for which Daniel Goldstein obtained a judgment against him in the common pleas court.

The theory of counsel for the executors is that loss of service is such an injury to Daniel Goldstein, that it is within the \$10,000 clause of the policy.

Many cases are cited by counsel for plaintiffs to the effect that in the construction of insurance policies the court should strongly construe the policy against the insurer because he has prepared the policy.

There is no doubt whatsoever that the principle of law laid down by the Supreme Court of Michigan, in the case of *Utter v. Insurance Company*, 65 Mich., 545:

"When a stipulation or exception to a policy of insurance, emanating from the insurers, is capable of two meanings, the one is to be adopted most favorable to the insured,"

is the general rule of law and is the one followed by all courts in the construction of insurance policies. *May on Insurance*, Sections 174 and 175.

There is also no doubt of the principle contended for by counsel for plaintiff that loss of service of a wife, because of bodily injuries sustained because of the negligence of another, is an injury to the husband for which he may maintain an action. *Mewhirter v. Hatton*, 42 Iowa, 288, at 291.

Conceding, for the purpose of argument, that a policy of insurance must be given the most reasonable construction possible and must be construed so as to give the assured a right of action under the policy, provided such construction does not do violence to the policy, can it be said that the policy sued upon in this case bears such a construction?

In the body of the policy the assured is indemnified against loss from liability imposed by law upon the assured for damages on account of bodily injuries. In condition A, where the word "injuries" is used limiting the liability to \$5,000, it is preceded by the word "such." This necessarily must refer to "bodily injuries," mentioned in the main body of the policy, and in the clause following condition A, where the word "injuries" is used, it is qualified by the word "bodily."

Counsel for plaintiffs, however, contend, because the word "bodily" is omitted from the second part of condition A, "and subject to the same limit for each person, the corporation's total liability on account of any one accident resulting in injuries to more than one person, including death, is limited to ten thousand dollars (\$10,000)," that it will not be doing violence to the construction of the policy by holding that "injuries," as used in this part of the condition, means injuries sustained by the husband of one who has sustained bodily injuries; in other words, that the policy means that in the event one person receives bodily injury, and if the husband of such person recovers damages against the assured, and if the judgments for the personal injury to the wife and the consequential injury to the husband exceed \$5,000, the company is liable up to \$10,000.

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No case has been cited to me bearing out such a construction and I have been unable to find any case either directly or indirectly sustaining such a contention.

In my opinion, the word "injuries," as used in the \$10,000 part of condition A, means "bodily injuries," and inasmuch as Daniel Goldstein did not sustain any bodily injuries, and inasmuch as Jennie Goldstein's judgment for \$5,000 exhausts the liability of the company under condition A, the plaintiffs can not recover in excess of that amount. To hold otherwise would be doing violence in the construction of the policy and would be unreasonable.

The defendant claims that the court should correct the verdict of the jury as far as the question of costs in the second Jennie Goldstein trial and interest on that judgment are concerned.

In reference to the question of costs in the second trial and expenses incurred in that trial, I do not think the verdict should be corrected. There is no evidence supporting the contention of the defendant that the plaintiffs' counsel agreed to defend the second suit without any expense to the defendant corporation. On the contrary, the evidence clearly shows that there was no meeting of minds on this proposition and that the plaintiffs' attorneys insisted throughout that the defendant corporation must bear the expenses of that trial.

As to the \$57.48 interest, which was allowed in addition to the \$5,000 judgment, I am of the opinion that the contention of counsel for the defendant is well taken. The weight of authority in this country on policies of this kind limit the recovery to the face amount of the policy and all necessary expenses incurred in the defense of the claim made upon the assured. Interest is not considered part of such expense.

The cases cited by counsel for defendant sustaining this view are: *Maryland Casualty Co. v. Omaha Electric L. & P. Co.*, 157 Fed., 514; *Davison v. Maryland Casualty Co.*, 197 Mass., 167; *Monroe v. Maryland Casualty Co.*, 96 N. Y. Supp., 705.

The leading case to the contrary cited by counsel for plaintiffs is the case of *Aetna Life Ins. Co. v. Bowling Green Gaslight Co.*, 150 Ky., 732. But as this case is against the weight

of authority, I do not think it should be followed. This latter case is also reported in 43 L. R. A. (N. S.), 1128, where all the cases to the contrary are cited.

Counsel for defendant also claim that inasmuch as on July 30, 1915, they offered to confess judgment for \$5,670, that the costs in this case incurred after that date should be charged against the plaintiffs.

If it should be ascertained that the amount due the plaintiffs under this opinion was less than \$5,670 on the 30th of July, 1915, of course, the plaintiffs can not recover any costs after that date.

The amount of interest, \$57.48, with interest from April 28, 1915, to the 1st day of January, 1917, may be deducted from the verdict, and judgment for the balance may be entered against the defendant corporation, the question of costs to be ascertained as above indicated.

The motions of both plaintiffs and defendant for a new trial are accordingly overruled.

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Humphrey v. Rowley et al.

CLAIM OF CO-HEIRS BARRED BY THE STATUTE.

Common Pleas Court of Hamilton County.

MARY HUMPHREY v. RUDOLPHO R. ROWLEY ET AL.

Decided, 1916.

Limitation of Actions—Action to Enforce Agreement Among Heirs as to Payment of Debts of the Estate—Bar of the Statute Interposed.

A, M, and J, the heirs of W, deceased, on March 23, 1899, entered into an agreement to divide the lands of W as follows: A to take the home farm east of the township road, assuming an indebtedness of \$3,000, more or less, that existed against W's estate; M to take the home farm west of the township road, except certain designated lots of land, and to assume \$1,000 of the indebtedness of said estate; and J to have the balance of the estate free from any of the debts of the estate. Mutual conveyances to carry out this agreement were made by the parties. The said A paid only \$1,600 on account of the debts of the estate. The said M, in order to protect the title to the real estate she received in the amicable partition, was compelled to pay debts amounting to \$1,217.85 over and above the \$1,000 assumed by her. On September 15, 1903, A paid to M the sum of \$255, on account of the \$1,217.85 paid by the said M. In an action brought by M against the heirs of A, to recover from them the amount claimed to have been paid by said M on account of the indebtedness assumed by said A, less the said \$255, and for a lien upon the real estate conveyed under said agreement to said A, in favor of said M, to secure the said amount; *Held*, That the action is barred by the statute of limitations, more than ten years having elapsed between September 15, 1903, the date of the alleged payment, and the date of the filing of the petition.

Charles M. Leslie, for the demurrer.*Charles S. Bell* and *I. L. Huddle*, contra.

GEOGHEGAN, J.

Heard on demurrer to the second amended petition.

This matter can be disposed of by the application of simple but well known principles to the facts as stated in the second amended petition. They are, briefly, as follows: That John

Humphrey, Angie H. Rowley and the plaintiff were the children and heirs at law of William Humphrey, deceased; that Angie H. Rowley is deceased and the defendants are the husband, children and grandchildren of the said Angie H. Rowley; that William Humphrey, on the 9th day of January, 1892, executed his promissory note to the plaintiff, Mary Humphrey, in the sum of \$1,000; that he died on the 4th day of October, 1894; that by his last will and testament he devised his property to his wife, Rosamond Humphrey, for life, with remainder to the three children, John, Angie H. and Mary, share and share alike; that the said will was admitted to probate on the 19th day of October, 1894, but that no further steps were taken to administer the said estate; that at the time of his death no part of the note had been paid; that Rosamond Humphrey, the life tenant, died on or about October 4, 1898; that subsequent to the death of said Rosamond Humphrey, the aforementioned John, Angie H. and Mary entered into an agreement for the amicable partition of the real estate; that said agreement was as follows:

“REMINGTON, OHIO, Mar. 23, 1899.

“This paper is to certify that we the undersigned, John Humphrey, Mary Humphrey and Angie H. Rowley, heirs of the estate of William Humphrey (deceased) do hereby agree among ourselves to divide the said Estate situated in Symmes Township near Remington, Ohio, according to said William Humphrey's Will, in the following manner: Angie H. Rowley to take the Home Farm East of the Township Road assuming an indebtedness of \$3,000 Three Thousand Dollars more or less that exists against said Estate; Mary Humphrey to have all of the Home Farm West of said Township Road except Lot near Remington Station and a strip of land running East from the School house lot, the north line running East with the north line of the School House fence to the Township Road, said Mary Humphrey to assume \$1,000 One Thousand Dollars of the Indebtedness of the said William Humphrey Estate.

“John Humphrey to have lot near the Station and a strip of land running East from School house lot, the north line being the North line of School House Lot running east to the Township Road, and The Farm known as the upper place purchased

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from Mrs. Mary Rich. Said Farm to be free from debt of the said William Humphrey Estate.

“JOHN HUMPHREY,
“MARY HUMPHREY,
“ANGIE H. ROWLEY.”

That in pursuance of said agreement the parties thereto delivered to each other their deeds to carry said agreement into full force and effect; that neither Angie H. Rowley, during her lifetime, nor her heirs at law or next of kin, have complied with her obligation under said contract to pay \$3,000 of the debts due from the estate of said William Humphrey, but that only about \$1,600 was paid by said Angie H. Rowley on account of said debts; that on or about the 15th day of September, 1903, the said Angie H. Rowley paid on account of the indebtedness due this plaintiff under said contract for an amicable partition of the real estate of said William Humphrey the sum of \$255. The plaintiff prays that the court determine the amount due plaintiff and that an accounting be had from the heirs of Angie H. Rowley; that the difference between the amount paid and the amount agreed to be paid be declared a lien upon the real estate of Angie H. Rowley, deceased, or upon a fund created by the sale of said real estate, and that the amount be ordered paid to this plaintiff.

The plaintiff claims that she is entitled to this relief by reason of the fact that to protect her title to the said real estate, which she received in the amicable partition, she was compelled to pay debts due from the estate of said William and Rosamond Humphrey in the sum of \$1,217.85.

The defendants demur to this petition for several reasons, but the matter can be disposed of upon the ground that the action was not brought within the time limited for the commencement of such actions.

This action was brought on June 3, 1915.

Counsel for plaintiff insists that this is an action upon the contract set forth above, and payment having been made, as recited, in September, 1903, he would still have fifteen years

from that date within which to bring the action under the provisions of Section 11223 of the General Code.

However, an examination of the contract discloses that in so far as the plaintiff is concerned the contract was not made for her benefit. While it is true that Angie Rowley agreed to pay certain debts, the plaintiff herself also agreed to pay certain debts. The contract, therefore, was not for the benefit of the parties to the contract, but was for the benefit of the creditors of the estate. If the plaintiff, Mary Humphrey, undertook to pay certain of the debts which Angie H. Rowley might have been obligated to pay under the contract, then the best position that the said Mary Humphrey can place herself in is that of being subrogated to the rights of the creditors under the contract.

Assuming that the creditors of the estate of William Humphrey would have had a right to enforce this contract as against Angie Rowley—an assumption that is only made for the purpose of this opinion—and if the said Mary Humphrey, for the purpose of protecting the property she received in the partition proceedings against these claims, voluntarily stepped in and paid them, she must either rely upon an implied promise on the part of Angie Rowley to reimburse her for what she had paid or claim to be subrogated to the rights of the creditors she had paid under the contract as against the said Angie Rowley. In either event this claim would be barred, because, assuming that the payment of September 15, 1903, tolled the running of the statute, still, more than ten years had elapsed from that time to the date of the filing of the petition, and therefore, taking the view either of an implied promise to reimburse or the right to be subrogated to the claims of the creditors, the action would be barred either by the six-year statute of limitations or the ten-year statute of limitations, respectively. *Neilson & Churchill v. Frey*, 16 Ohio St., 553; *Poe v. Dixon*, 60 Ohio St., 125; *Neal v. Nash*, 23 Ohio St., 483.

I have held heretofore in this same case that the said Mary Humphrey could not sue as a creditor, because of the note of \$1,000 upon this contract. The contract does not designate

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either a specific creditor whose claim is to be paid, or a specific class whose claims are to be paid, and therefore the doctrine of *Emmit v. Brophy*, 42 Ohio St., 82, is not an authority to support plaintiff's contention herein. The obligation of Angie Rowley, in so far as the contract is concerned, was simply to pay \$3,000, more or less, of the debts of the estate. She neither agreed by this contract to pay the debt due to Mary Humphrey, nor did she agree to pay all the debts of the estate. Therefore, Mary Humphrey, as an individual creditor of the estate, could not bring an action on this contract to recover her debt because the contract can not be construed as an agreement to pay that debt.

Certain New York cases which support this view have been discussed by me in the opinion on the motion for a new trial in the case of *Emerson v. Central Trust & Safe Deposit Company*, No. 155346 on the dockets of this court, and it is also supported by the following Indiana case, *Reynolds v. Railway*, 143 Ind., 579.

For these reasons the demurrer will be sustained.

CUSTODY OF CHILDREN.

Common Pleas Court of Wood County.

IN RE DOROTHY E. TAYLOR.

Decided, January Term, 1913.

Jurisdiction—Where Custody of Child is in Dispute—Residence of One Parent and Presence of Child Sufficient to Confer Authority Upon a Court to Act—Best Interests of Child to be Guarded.

In an action involving custody of a child, as to which there has been no judicial determination, the residence of the parent having the present custody is sufficient to confer jurisdiction, and where the best interests of the child seem to require that such custody be continued it will not be disturbed, notwithstanding possession of the child was obtained by kidnapping it from the contesting parent in another state.

Erwin Cummins and B. F. James, for petitioner.

McClelland & Bowman, for respondent.

DUNCAN, J.

This case is here on error from the probate court of this county. It was an action in habeas corpus instituted by Dorothy E. Taylor of Washington county, Pennsylvania, against Charles A. McGarvey, having in custody in this county one William Taylor McGarvey, seven years of age, whom she claims the respondent unlawfully detains from her. The court below denied the prayer of the petition and awarded the child to the respondent as long as he should keep and care for it in the home of his brother, Benjamin McGarvey, in this county, and the petitioner is now here seeking reversal of that judgment upon the ground that the same is against the law and the evidence.

The respondent and the petitioner were husband and wife, and said William Taylor McGarvey is a child of the marriage. They were divorced September 19, 1912, upon her application, by the Court of Common Pleas of Washington County. Penn-

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sylvania. They lived together in said county with this child as a member of the family until June 12, 1912, the date of the beginning of the divorce action. The respondent thereupon left the home and soon after came to this county, but the child continued to live with the petitioner, its mother.

On August 13, after the action for divorce was begun, but before it was heard, the parties entered into a written agreement settling their property rights, stating the fact that their children, this child and another, were in the custody of the petitioner and reserving full right and privilege in the respondent to visit them, but relieving him from any liability for their support as long as they remained with her. The agreement does not in terms provide for their custody. That part of the agreement reads as follows:

“It is further understood and agreed between the parties hereto that the party of the first part (Charles A. McGarvey) shall have the undisturbed right at any time whatsoever to call upon, see and converse with the children of the said parties hereto, as long as they may remain living separate and apart, now in the possession of the party of the second part (Dorothy E. McGarvey), and for the consideration aforesaid, the party of the second part, hereby releases the party of the first part from all liability for the support and maintenance of herself and children.”

On the very night of the day this agreement was signed, August 13, 1912, the respondent went to an adjoining county to that of Washington, where said child was then temporarily with its maternal grandmother, and stole it away, took him to Pittsburgh and thence to Ohio and this county, where it has since been living with the respondent, his father, at the home of Benjamin McGarvey, his father's brother.

After that the said divorce case proceeded to trial and a divorce was granted the said petitioner from the respondent, September 19, 1912, on the ground of his adultery as in the petition set forth. But nothing is said about these children in the divorce petition, in the evidence attached to the certificate or in the judgment of the court, or that they had any children.

The petitioner, for more than a year, was, and still is, the keeper of a restaurant and rooming house in the village of Cannonsburg, a town of six or seven thousand population, lives there in the house, attends to all finances and manages the business and has a number of employees, both men and women, and manages to make a gross earning of fifteen hundred to two thousand dollars a month, which, of course, speaks well for her business ability and her ability in a financial way to care for her children. She not only employs some men in the running of this restaurant, but she is brought into constant association with them, especially with one William Van Sickle, a married man not living with his wife, on whom she relies for the professional part of the work and as a confidential business adviser, which, of course, created some suspicion upon the part of the respondent that Van Sickle had taken his place in her affections. I do not say that there was anything wrong between the petitioner and Van Sickle, but there was enough in their relations and conduct towards each other to cause others to be suspicious as well, and it became the subject of much talk. I do say, however, that when a married woman with husband and children leaves her home and enters business for herself, she enters another realm from wife and mother, loosens the ties of the marital relation and must necessarily neglect her duty as wife and the care and attention due her children of tender years otherwise bestowed by a devoted mother. Who can say then, that there was no reason in the probate court denying this writ upon the ground that the petitioner did not have a proper place and was not a proper person to have the custody and control of this child?

A reading of the evidence given in the probate court would also lead one to think, from his relations with other women, that there was something to the claim that the respondent had a venereal disease two or three times and warrant the conclusion of the probate court, based on such facts, that he was not a fit person to have the unconditional custody and control of this child.

We have a statute in Ohio, Section 8032, General Code, which provides that, "When a husband and wife are living separate

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and apart from each other, or are divorced, and the question as to the care, custody and control of the offspring of their marriage is brought before a court of competent jurisdiction in this state, they shall stand upon an equality as to the care, custody and control of such offspring, so far as it relates to their being either father or mother thereof," which, of course, leaves it open for the court to decide the matter in such way as appeals to his judgment may promote the child's welfare. This seems to be the Polar star for all adjudications on the subject.

In *Clark v. Bayer*, 32 Ohio St., 299, 305, Judge Ashburn says:

"In cases of controverted custody, the present and future interests of the minor controls the judgment and directs the discretion of courts. While the legal rights of parents are to be respected, the welfare of the minor is of paramount consideration."

In *Richards v. Collins*, 45 N. J. Eq., '283, where the custody of a child was in controversy, it is said:

"In a controversy over its possession its welfare will be the paramount consideration in controlling the discretion of the court. The strict right of the parent will be passed by, if a judgment in observance of such rights would substitute a worse for a better condition."

In *Kelsey v. Green*, 69 Conn., 291, Chief Justice Andrews says:

"In contests between parents and third persons as to the custody of a child of such parents, the opinion is now almost universal that neither of the parents has any right that can be allowed to militate against the welfare of the infant; the paramount consideration is what is really demanded for its best interests."

In *Chapsky v. Wood*, 26 Kan., 650, Judge Brewer says:

"A parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. If it were, it would end this case. The paramount consideration is, what will promote the welfare of the child."

In *United States v. Green*, 26 Fed. Cas., 30, Judge Story says:

“When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances and ascertain whether it will be for the real permanent interest of the infant.”

In *Stringfellow v. Somerville*, 95 Va., 701, Judge Keith says:

“The question is not which of the two claimants can surround the infant with greater luxury, or which of the two will be able to give or bequeath him the greater amount of money or property, but with which of them is he likely to be reared and trained so as to make him the better man and better citizen.”

This being the rule, I am unable to say from the evidence in this case that the order of the probate court for the disposition of this child was manifestly wrong, but that it was manifestly right.

The feature of this case which has given me the most trouble is the fact that the respondent procured possession of this child by a trick and brought him into this jurisdiction and state other than his domicile, where the parties had lived and were known and whose courts had a better opportunity of investigation and for determining his best welfare. I have always noticed that where a party resorted to some trick or stratagem to give another court jurisdiction, or in an effort to put himself in a better position to win, or where the court would have to approve a dishonest proposition in order to decide for him, that it was pretty safe to decide against him. So I have thought in this case, but I am unable to find the law that will warrant me in so deciding.

The respondent had been a resident of this state for three months when this suit was begun. On the record, the respondent had as much right to the custody of this child as the petitioner, and if he had such right, it can make no difference how he acquired its custody in order to realize the actual enjoyment of the right. The domicile of the child is changed with the domicile

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of its parents or the domicile of that parent having its lawful custody.

In *Lanning v. Gregory*, 99 S. W. Rep., 542 (Tex.), the Supreme Court of Texas has laid down the rule that "The domicile of an infant follows that of his father upon the latter's changing his domicile from one state to another, notwithstanding an agreement between its parents, upon their separation, that the mother should have the control of the child."

In *Wakefield v. Ives*, 35 Iowa, 238, it appearing that the child was born in Minnesota and resided there when its mother was given a decree of divorce in that state and the custody of the child, upon constructive service against the father, a non-resident, the decree was recognized as binding and conclusive in a habeas corpus proceeding in Iowa by the mother to secure the custody of the child from the father, who had obtained its custody in some way not shown.

In *State v. Rhoades*, 29, Wash., 61, it was held even upon the assumption that the children were domiciled in Colorado with their father, the latter's voluntary appearance in a suit for divorce brought by his wife in California was sufficient to confer jurisdiction upon the court of the latter state to award the custody of the children, it appearing that, shortly before the divorce, they had been taken by the wife from the husband's domicile in Colorado without his knowledge, and brought to California.

In *Hanrahan v. Sears*, 72 N. H., 71, one appointed in Vermont guardian of the person of a minor, who was then resident of that state, brought habeas corpus proceedings in New Hampshire to obtain custody of the child from relatives with whom the minor had lived for a number of years after the relator's appointment as guardian. The court seems to have entertained no doubt as to its jurisdiction to determine the custody of the child, and to award it to the defendants as its best interest demanded.

In *De la Montanya v. De la Montanya*, 112 Cal., 101, the court, in denying the jurisdiction to award the custody of minor children who were with their father outside of the territorial jurisdiction, upon constructive service of summons against the father, even upon the assumption that the father, though absent

from the state, was domiciled therein, and that the court had jurisdiction to dissolve the marriage relation, said: "If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of them."

In *Kline v. Kline*, 57 Iowa, 386, it appearing at the time of a decree of divorce rendered in Wisconsin in favor of the husband, who was domiciled there, upon constructive service against the wife, who had acquired a separate domicile elsewhere, the minor children were living with the wife in Iowa, it was held that, while the decree was valid and entitled to recognition in the latter state so far as it affected the status of the husband and wife, it was without jurisdiction, and not entitled to recognition so far as the attempt to fix the custody of the minor children.

To the same effect is *Rodgers v. Rodgers*, 56 Kan., 483, but it will be noticed that the presence of the child within the territorial jurisdiction aided by the residence of one of the parents is lacking in both of these cases. Here we have the residence of one parent, the presence of the other and the presence of the child, and I therefore hold that the probate court had jurisdiction to make the order complained of. And holding the views expressed on the first proposition, it follows that the judgment of that court should be affirmed.

Judgment affirmed at the costs of the plaintiff in error and execution is awarded.

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LIABILITY FOR AN ACCIDENT ON A SCENIC RAILWAY.

Common Pleas Court of Hamilton County.

AGNES SENTKER V. ISAAC M. MARTIN ET AL.

Decided, January Term, 1917.

Negligence—Presumption of, Arises in the Operation of a Scenic Railway, When—Highest Degree of Care Required in the Operation of —Passenger Injured by Car Leaving the Track.

1. A person controlling and operating an amusement device known as a scenic railway, is a carrier of passengers and is bound to exercise the highest degree of care for the safety of such passengers and to do all that human foresight and vigilance can do consistent with the mode of conveyance and the practical operation of its business to prevent accidents to them.
2. If an injury to a passenger on such scenic railway is caused by apparatus wholly under the control of the owner and furnished and managed by him, and the accident is of such a character that it would not ordinarily occur if due care was used, a presumption of negligence arises from the nature of the accident and the attending circumstances though not from the mere fact of the accident itself.

Pogue, Hoffheimer & Pogue and Walter Helmholz, for the motion.

Michael Minges and Albert Graef, contra.

GEOGHEGAN, J.

Heard on motion for a new trial.

The plaintiff was injured while riding upon a scenic railway in the amusement park operated by the defendants. The car in which she was riding was of the type operated by gravity, and at a certain point in the line of the railway it left the track, causing her to be thrown out and injured.

After the accident an examination was made of the railway, the track, the car, the wheels and axles upon the car, and every-

thing connected with the device, and nothing unusual or out of the ordinary was found. Other cars were operated over the same device immediately after the accident and they pursued their course along the tracks from the beginning to the end without accident or mishap.

The jury returned a verdict in favor of the plaintiff for \$500, and it is now sought to have the court set this verdict aside and grant a new trial, the principal contention being that the defendants, by their evidence, met the *prima facie* case established by the plaintiff, and that therefore the verdict of the jury is contrary to the weight of the evidence.

That the plaintiff in riding upon this device was a passenger and as such the defendants, in operating the car, owed her the duty to exercise the highest degree of care and to do all that human foresight and vigilance can do consistent with the mode of conveyance and the practical operation of its business to prevent an accident to her, is conceded. This rule is clearly laid down in the case of *O'Callaghan v. Dellwood Park Co.*, 242 Ill., 336, a case practically on all fours with the case at bar, wherein the Supreme Court upheld a verdict for the plaintiff where the plaintiff's case was rested entirely upon the presumption of negligence arising out of the nature of the accident and the attending circumstances.

And in the case of *Cincinnati Street Railway Co. v. Kelsey*, 9 C. C., 170, the Circuit Court of this county held that where no negligence of the passenger appears and there is no explanation for the escape of the car from the track, and nothing is shown that it was unavoidable, notwithstanding a high degree of care and skill on the part of the railway company, then the jury is authorized to presume that there was some negligence on the part of the company.

This doctrine is also laid down in the case of *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St., 379.

It would seem, therefore, that a jury had a right to balance the presumption of negligence arising from the nature of the accident and the circumstances attendant thereon as against

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the evidence offered by the defendants that there was no defect in the device or negligence in its manner of operation that could have caused the accident. If the jury, in thus balancing the testimony, disbelieved the statements of the witnesses for the defendants as to their examination immediately succeeding the accident, or felt that the accident was of the kind that in the ordinary course of events would not have occurred without some negligence on the part of the defendants, they were right in finding for the plaintiff, and as the case was purely one for the jury, the court should hesitate to interfere with its verdict if the rules of law appertaining to circumstances such as surrounded this accident were squarely presented to the jury. The doctrine of *res ipsa loquitur* is based entirely upon the proposition that the facts are peculiarly within the knowledge of the alleged wrongdoer, and even though the defendants may show by negative evidence that nothing could be found by examination and inspection which caused the accident, it would seem that the jury, in the proper application of that doctrine to the facts of the case, have the right to regard this negative evidence as not controlling or of little weight and base their verdict entirely upon the presumption arising out of the unusual nature of the accident, happening upon a device entirely under the control of the defendants.

In view of this reasoning, the contention of the defendants can not be sustained.

The defendants also offered, in bar of this action, a release claimed to have been executed by the plaintiff shortly after the accident. The plaintiff met this by saying that she did not sign any release, or that if she did sign a paper purporting to be a release, her signature was obtained while she was unconscious or in such a state of semi-consciousness that she was incapable of appreciating the nature of the act she was called upon to perform. The evidence shows that while she was lying on a cot before she had been removed from the park, this signature was obtained. That she was suffering from pain and in an unconscious condition was supported by evidence offered in her

behalf. This, of course, was contradicted, and therefore it was the duty of the court to submit to the jury the question whether at the time the alleged release was signed, if it was signed by her, she was in a condition to appreciate the nature of her act. The jury found for her, which is, in effect, a finding that she either did not sign the alleged release, or, if she did sign it, she did not know what she was doing.

The court is unable to say, in view of the conflicting evidence upon this point, that the verdict of the jury is contrary to law or manifestly against the weight of the evidence.

The motion will therefore be overruled.

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Clark v. Neil, Trustee, et al.

**POWERS INHERING IN A TRUST EXTENDING THROUGH
THREE GENERATIONS.**

Common Pleas Court of Franklin County.

THOMAS H. CLARK v. WILLIAM NEIL, TRUSTEE, ET AL.

Decided, March 15, 1917.

Trust—Created by a Testator—To Continue Until Title Finally Vests in His Great Grandchildren—Power Necessary to Carry Out Provisions of the Trust—Held to Inhere in the Office—And Not to the Person Named as Trustee in the Will.

The trust created by the testator William Neil, running through the lives of three classes of persons, is a trust connected with the office and not exclusively with the person named as trustee in the will, and the powers and duties conferred on the trustee, including the power to convey land by good and sufficient title, is a power running through the life of the trust, to be exercised successively by the person or persons upon whom execution of the trust for the time being devolves.

Thomas H. Clark, for plaintiff.

J. W. Mooney, contra.

DILLON, J.

This case is submitted on its merits upon an agreed statement of facts.

It involves the validity of title to property which came through William Neil, trustee for Henry M. Neil and family.

The question is whether William Neil, as trustee of William Neil, deceased, had the power and right to make deeds of conveyance of lands devised by the decedent without authority or order from court.

This question involves all titles in the addition of Indianola Forest, City of Columbus, excepting a few lots for which deeds were given by the original trustees. The interests are very great and the question of vast importance.

Some question was raised in the early history of this addition touching the power of William Neil, trustee, to make deeds in

fee for this property without having first obtained an order of court, and in one instance it is said opinion was given that an order of court was essential.

On careful examination of the law and the will I am of the opinion that such order was unnecessary; that William Neil, trustee, had full power and authority to sell the property without obtaining an order from the court and that his deeds convey legal title, and that the plaintiff is entitled to the relief by him sought, quieting the title to his property.

I fully coincide in the opinion of my associate, Judge Kinkead, who while in practice passed on the validity of the title to this property when the Indianola Forest Addition was opened up. I am content with adopting his opinion as that of this court, which is now here in part set forth:

William Neil died testate May 18, 1870. I have read over the entire will in order to arrive at the full scope and extent of the trusts provided for therein. The testator's intention, as to these trusts, and how they were to be carried out, has *all to do* with the determination of the *powers* of a successor in the trusteeship.

The premises were devised to Robert E. Neil and William Dennison in trust.

There are four distinct trusts created in this will; Item 2 creates a trust for the benefit of John G. Neil; item 3 creates a trust for the benefit of Henry M. Neil; item 4 creates trusts for the benefit of John G. Neil and Henry M. Neil, for their shares, respectively, of the residuary estate.

The powers and duties conferred on the trustees for all these trusts are:

1. To collect rents, profits and interests, to pay taxes, and to pay the income to the support of John G. Neil and Henry M. Neil.

2. To sell any part of the real estate, and to invest the proceeds.

3. To hold the proceeds for the benefit of John G. Neil and Henry M. Neil.

4. To pay over to any child or children of the two beneficiaries, after their deaths.

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The purpose of the trust was to place the entire management of all the property devised for the benefit of Henry M. Neil and his family in the hands of trustees for the *support* of Henry M. Neil and family. To enable the trustees to fully carry out this trust, the testator gave full authority to them to sell his land, *the proceeds to be held in trust for the same purposes, and for the same purposes as said land was to be held.*

The polar star of this trust was the “*support of said Henry M. Neil and his family, during the lifetime of said Henry M. Neil.*”

Upon the death of Henry M. Neil the income to be derived from the trust was to be paid to the children of Henry M. Neil, and at their death the “principal” (not the land), is to be paid over to the children of such deceased child or children, *i. e.*, the great-grandchildren of the testator.

The fact that the chief purpose of the trust is *the support* of Henry M. Neil and his children during their lives, and the further fact that the will provides that, “at their death (William Neil’s grandchildren), respectively, to pay over the share of the *principal* to the children of said deceased child or children,” shows that the testator intended the broad and comprehensive powers of sale to be coupled with this trust, that is, with the *office of trustee*, during the continuance of the trust. He provides for the continuance of the trust throughout the lives of his son, Henry M. Neil, and of his children, the testator’s grandchildren. The testator must be presumed to have believed that his self-appointed trustee could not possibly live throughout the life of the trust he was creating. And this trust, it will be remembered, was to pay “*principal*” derived from both the income by way of rents and profits from the real estate, as well as that which was derived from the sale of his lands, over to his great-grandchildren at the end of his trust.

The testator nowhere made a devise of a remainder in the fee to the lands of his grandchildren, that which is to go to them being the *principal* derived from the proceeds which he directs to be invested.

The trust was not, merely to hold the lands, and to receive the rents and profits, but to sell the lands. The will does not provide that the trustees should sell when they should see fit,

but the broad and comprehensive power of sale is conferred and coupled with the trust, which is only complete when the land is all sold.

The provision as to the power of sale is as follows:

"I do fully authorize and empower said trustees to sell all or any part of said real estate, in such quantities, in such manner, on such terms, and at such prices as to them shall seem best, the purchaser not to be liable for the application of the purchase money; and to execute any and all conveyances and other papers therefore that are proper and necessary, and to collect and invest the proceeds in such manner as they deem best, the proceeds of said land to be held in trust for the same purposes, and for the same purposes as said land is above directed to be held.
* * *

"If one of said trustees should accept said office or trust, or if after acceptance of both, one should resign or cease to act, or be absent from Columbus when any act was necessary to be done, all the powers and interests of this will invested in said trustee shall pass to and be exercised by the sole trustee acting."

There is a marked distinction between the powers of an executor merely, and a trustee. In the great majority of instances when power is conferred upon an executor, it is to be regarded as purely personal. It can not in such a case be exercised by an administrator with the will annexed. We have a case of that kind in Ohio (*Wills v. Cowper*, 2 Ohio, 131). The doctrine of that case, however, is not to be confounded with the rule to be applied to the trust in hand.

Powers of trustees are of different kinds:

1. Powers in the nature of a trust, and
2. Naked or discretionary trust.

"A power in the nature of a trust, or a mixed trust and power, is a power annexed to the office of trustee for *the purposes of the trust* and to promote its objects. It is an imperative power, imposing a duty on the trustee which must be executed and the performance of which can be enforced." 28 *Encyc. of Law*, 984; *Freeman v. Prendergast*, 94 Ga., 369.

"Naked, or collateral, or discretionary powers are powers to be exercised, or not, by trustees at their sole discretion, and according to their own judgment." *Id.*, 985.

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And again,

“Discretionary powers are sometimes considered to be merely ministerial in character, such as the power to sell or lease, as distinguished from personal powers, to be exercised entirely as a matter of judgment.” *Id.*, 985.

“Powers that are considered to be purely discretionary or naked, or collateral, can be exercised only by the designated donees in person. On the other hand, those powers which are coupled with an interest or annexed to the office of the trustee will pass with the trust to the successors or survivors of the original trustees and can be exercised by them.” *28 Encyc. of Law*, 988.

In the case of *Peter v. Beverly*, 10 Peters, 532, the Supreme Court of the United States stated:

“The general principle of the common law, as laid down by Lord Coke and sanctioned by many judicial decisions, is that when the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be exercised by all, and does not survive. But where the power is coupled with an interest, it may be executed by the survivor. But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, to the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, * * * or other trustee, is invested with the rents, and profits of land, for the sale or use of another, it is still an authority coupled with an interest, and survives.”

Again, Mr. Justice Platt in the case of *Franklin v. Osgood*, 2d John's Ch., 19, refers to a class of cases in the English courts, where it is held that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell, yet, if from its connection with other provisions in the will it clearly appears to have been the intention of the testator that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive.

The trusts in the Neil will, within the purview of all the authorities, are coupled with an interest, and are given or conferred on the trustees, *virtute officii*. They come within the general doctrine stated in the case of *Wills v. Cowper*, 2 Ohio, 131, viz.:

“Where a trust is created and power given to the trustee, which it is his duty to execute, he is considered as a trustee of the power, and not as having a discretion to exercise it or not; and neither the negligence nor death of the trustee, or other circumstances, will be permitted by this court to defeat the interests of those for whose benefit it was his duty to execute it.”

The power of sale is so coupled with the trust that it passes to and vests in a successor.

I refer to authorities which conclusively show that the Neil trusts and the power of sale connected therewith are connected with or relates to the office of trustee, and may be exercised by a successor.

In *Boutelle v. Bank*, 17 R. I., 781, is to be found a clause in a will, about which it would seem there would be more doubt as to the power of sale passing to the trustee appointed by the court than is the case in the Neil case. The seventh clause in the will in this case is as follows:

“If it should appear desirable, from any cause that may arise, that my real estate had better be sold, and the avails thereof invested in some good stocks, or on mortgage, I authorized my executors so to do, or the survivor of them, as executor or trustee, and that the same may be done with the last named undi-

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vided half while held in trust, and to appropriate the use and income thereof as hereinbefore directed, confiding in the discretion of my said executors and trustees for such contingency.”

Objection was made to the power of the trustee under the will to make sale of the property. The following is quoted from the opinion:

“In May, 1889, W. M. B. resigned the said trust, and the complainant was appointed trustee in his place by decree of this court. The question is, whether the new trustee succeeded to the power of sale.”

“In Lewin on Trusts, 608, cited in *Bailey v. Burges*, 10 R. I., 422, it is said that it seems that the appointment of new trustees by the court would not, but for recent acts communicate arbitrary or special discretionary powers, unless there were expressly or in fair construction limited to the trustees for the time being.

“In this case we think the power is annexed to the office, and not to the person named as trustee in his individual character. Power is given to trustees, in the plural, as though the testatrix had in mind other trustees as successors. Moreover, it is to continue while the property is held in trust. This is equivalent to give it to the trustees for the time being, and so within the rule of the cases.”

The case of *Druid Park, etc., Co. v. Oettinger*, 53 Md., 46, is a much stronger illustration, notwithstanding the testator made provision for a successor. In this case, it was held that the trustee appointed by the court had power to proceed according to the terms of the will, and make sales of real estate without an order of court.

The clause in the will in this case is as follows:

“And I hereby authorize and empower my executor and trustees, and the survivor of them, and the heirs, executors and administrators of the survivor, either in their capacity as executors or trustees, or both capacities, if necessary, to sell and dispose of any part or parts of my real estate, real, personal and mixed, either at public or private sale as to them, or him shall seem most advantageous for the purposes of raising the sum of \$20,000 hereinbefore devised in trust for the benefit of my said beloved wife for life, etc., * * * and to make, execute and deliver, in due form of law, necessary deeds, conveyances and

assignments for the estate and property so sold to the purchaser or purchasers thereof.”

“John J. Griffith and Chas. B. Keyworth were appointed executors. Griffith died leaving a son who was a minor. His administrator declined to execute the trust; a bill was filed for the appointment of a trustee to execute the trust, alleging the minority of the heir at law of John J. Griffith, the trustee who had died, and insisted for a new trustee to be appointed. Andrew J. Myers was appointed trustee. He afterwards sold, at private sale, to one S., the land mentioned in the will to be sold. *This sale was reported to the court and was ratified and confirmed by it.* The sole question in the case is, was this sale by Andrew J. Myers properly authorized and valid? Appellee contends that the will of Edward Griffith created a special and discretionary trust in the persons he names as trustees, and that the decree of the court did not give to Myers, the new trustee, power to make the sale, and could not do it; that the estate and powers passed irrevocably, under the circumstances stated by the will and the common law to the son of John J. Griffith, the acting trustee, as his heir at law, and that the sale made by Myers was without authority and void.

“The appellants, on the other hand, insisted that the intent of the testator is apparent to create trusts, without intending that the persons named should, at all events and at all hazards, execute them to the exclusion of all others, or of the control of the courts for their protection and preservation; and that it was within the power of the court of equity when the trust would fail for the want of a competent person to execute it, coming within the description and designation of the will, to appoint a trustee to execute and preserve the trust. And if it be conceded that there was a discretion reposed in the trustees named in the will which would not be reposed in a trustee appointed by the court, still the court could order the sale and could direct and approve the investment, and having approved the sale which was made it was doing a legitimate thing, and the sale is, therefore, good and valid, and the title of the purchaser can not be questioned.”

Among other things said, after having commented upon the various devises, the court said:

“To accomplish these objects he creates a trust; and for the purpose of making the estate productive he gives the trustees the power of selling and leasing, as might be most advantageous, in their judgment, to the parties. These were trusts the testator

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could not have intended to fail by reason of the death, refusal, or incapacity of any of the parties coming within the express terms which he has used to designate the trustees. The estate needed to be watched, managed, changed, sold or leased, so as to make it productive, and the testator was endeavoring to provide, so that in no event should there be wanting a trustee or trustees who could perform the duties necessary to produce that result. * * * Now, there was a trust, imperative in its character, and which he intended should be executed at all events whether the trustees he named failed to accept the trust or not; and it aids in getting the intent the testator had throughout the will. The exigencies of this trust might require the interposition of the court to execute, and it is very clear that a court of equity would have power to prevent this provision failing, for want of a trustee to discharge the duties."

Then referring to another trust which provided that there should be raised a \$20,000 fund, the court further said:

"It was clearly an imperative trust, which the court would compel to be executed, and if the trustees named refuse to execute it, the court would appoint one or more to sell and to execute the trusts fully. To that extent certainly it was a power attaching to the office, which the beneficiaries could insist on having executed. It was necessary to the successful carrying out of the testator's will. It does not appear from the objects and scope of the will that the testator intended reposing a special confidence in the sense of personal trust because of especial fitness beyond the persons designated by name.

"In the language used to designate their successors, in the event of death, such phrases are employed as would admit utter strangers to the testator to the execution of the trusts, and it might be persons who had no interest in him or his beneficiaries. * * * Looking to the whole of this will and the objects intended to be secured, we may well hold that this testator intended that whoever might be the trustee to carry out the provisions of his will, should have the power of sale, or leasing his estate for the purpose of making it productive and available for the *cestuis que trust*. In other words, that he was given a discretionary power, which he designed to attach to the office of the trust he was creating."

The court then enters into a consideration of the question whether or not the court had jurisdiction to appoint a trustee who would have the power to make this particular sale. It is

observed that the object of the application was not to procure a sale of the land, but it was to procure a trustee's appointment to carry out the trust, which, by reason of the minority of the heir at law and the renunciation of the executors of John J. Griffiths, was without an active trustee to discharge the duties; and if the power of sale attaching to the office of trustee; or if, without attaching to the office, the trust was under the control of the court and the court could direct the sale without further proceedings, and the appellant contends that the sale made and reported to the court and approved by it was valid.

Directing special attention to the power of this new trustee under the order of his appointment, authorize him to make a sale of this real estate, the court observes that in making the appointment all of the parties before the court in seeking a new trustee for the management of the trust,

“necessarily contemplated the sale of the real estate if necessary to the trust, or advantageous to the *cestuis que trust*. After the decree appointing the trustee on his *ex parte* application, the court would have ordered a sale. Without such application or previous order, the trustee has made a sale, and reported it to the court, and the court has ratified it after their notice. All intendments that can be made ought to be made in favor of such sale so adopted by and ratified by the court, for the security of the purchaser who has acted on such ratification.

“There are occasions and circumstances when a trustee must exercise a discretion, though none is given by the instrument creating the trust, otherwise great loss may happen to the estate; or a great opportunity may be lost by delay. Hence the rule has been adopted in equity, that a trustee may do that without a special order, which the court, on a case made, would order.”

In the case of *Edwards v. Maupin*, 7 Mackey, 39, the will provides:

“And I do hereby confer upon my said trustees full power and authority, at his or their discretion, from time to time, to sell by private or public sale, * * * all or any part of the trust property in this will devised and bequeathed to my said trustees, and to receive, grant acquittances for and reinvest the proceeds of such sales.”

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One of the trustees died and the other resigned, and two other persons were appointed trustees and the order conferred all of the powers which were vested in the original trustee by the terms of the will upon the new trustees. And the trustee, without an order of the court, sold the real estate and made a report thereafter to the court for approval thereof.

The court, as a matter of law, held if a testator omitting to direct that a trustee appointed by the court in case of a vacancy shall have the same discretionary power which he had given to an original trustee, then such discretionary power will be construed to be personal.

The case of *Radford v. Monks*, 132 Mass., 405, was under a statute authorizing the court to appoint a trustee.

“A testator by his will devised all his estate, real and personal, to two persons, one of whom was a son, in trust to convert the personal estate into money and to manage the real estate, repairing, leasing, and, if necessary, rebuilding and receiving the income thereof, and also provided as follows:

“And I authorize my trustees, if they think best, to sell and convey such of my lands as are in B, or any part of such land, and to reinvest the proceeds of such sale or lands with the proceeds of the sales of my personal estate.”

The lands in B were unimproved. *Held*: That the power to sell the lands in B was not restricted to the trustees named in the will, but might be exercised by their successor in the trusts. On March 7, 1881, Osborn Howes resigned the trust and Frank H. Monks was appointed in his stead. A bill in equity was filed against the trustees under the will to restrain them from selling real estate because they had no power under the will to sell the same. The court said:

“When the new trustee was appointed, he had, by force of the statute, the same powers, rights and duties as if he had been originally appointed, and the estate vested in him as it had vested in the trustee in whose place he was substituted. (General Stat., Chap. 100, Section 9.)

“If the power of sale attaching to the trust, and was not personal to the former trustee, it would pass to the new trustee as part of the trust.

“The testator evidently intended to authorize a sale * * * at any time during the continuance of the trust, when it should seem to the trustees to be for the advantage of the estate that they should be sold. The discretion given to the trustees as a part of the trust, and the power of sale has enabled them to execute the trust. It is a power coupled with a trust. The terms in which the power is given, the general provisions of the will, and the character and condition of the estate, are sufficient to show this; and the fact that the testator gave directions to the trustee authorized to make the sale as to the investment of his personal property, indicates that he understood that the sale would be made by the trustee who had charge of the personal property.”

The statute in that state provided that the trust estate shall vest in the new trustee in like manner as it has vested or would have vested in the trustee in whose place he is substituted.

Under a statute in Pennsylvania, which provided that every trustee appointed by the court shall have the same powers and authorities in relation to the trust to all intents and purposes as his predecessor in the trust had, the court held that a successor may exercise discretionary powers conferred upon the original trustee.

This was upon the theory that it is unreasonable to suppose that the donor either intended it to be exercised by the original trustee after his unworthiness had been ascertained, or designed that it should be lost. (*Wilson v. Pennough*, 27 Pa. St., 238.)

The statute in New York provides:

“The chancellor shall have full power to appoint a new trustee in the place of a trustee resigned or removed; and when in consequence of such resignation or removal there shall be no acting trustee, the court, in its discretion, may appoint new trustees or cause the trust to be executed by one of its own officers under its direction.” Section 71 of act relating to uses and trusts, R. S., N. Y., 2440.

In the 132 N. Y., 451, a case arose under this statute, the facts of which are as follows: Trustees appointed by a will refused to accept, whereupon one C was appointed by the court. C was discharged upon his own petition; others were appointed to take the trust, without limiting their powers or defining the

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manner of their execution. It was held that the appointment of defendants was not an exercise of the general equity powers of the court, but was pursuant to the statute authorizing the court "to appoint a new trustee in place of a trustee resigned or removed," and the appointees *took all the powers conferred* by the will on the original trustees.

So much for the decisions. The Neil will would come under the general doctrine of trusts above stated, which would authorize William Neil, successor in the trust, to perform the duties of the office and to make sales and conveyances.

But the statute in Ohio covers the ground. Section 5986 (now Section 10596), which authorizes the appointment of a trustee to execute a trust, was passed May 3, 1852. Judge Swan, in his early annotations of the statutes, stated that this statute was passed to clear up the doubt that previously existed as to whether or not a court of chancery could execute a trust where a will conferred a mere power of selling, or otherwise disposing of property and the power had not been executed. The statute reads as follows:

"If any testamentary trustee shall die, decline to accept, resign, become incapacitated, or be removed, and such will has not provided for the contingency of the death, incapacity or refusal of such trustee or trustees to accept or execute the trust, or such will names no trustee, the probate court, having probate of said will, may appoint some suitable person or persons *to execute the trust according to the will*, who shall give bond with security as provided herein." (Section 5986, R. S.)

A court of equity would have the power to appoint a trustee in succession upon the death of the trustee named in the will, without the aid of this statute, but the probate court not being a court of original equity jurisdiction, this statute would be necessary to enable it to appoint a trustee, though it was passed before the probate court was established.

The statute, however, goes beyond the mere power of appointment, and confers power on the "*person or persons to execute the trust according to the will.*"

The trustee, William Neil, is a trustee of the power, and may, therefore, exercise the power according to the terms of the will.

The terms of the will touching the power of sale are: "*I do fully authorize and empower said trustees to sell all or any part of said real estate, in such manner, on such terms, and at such prices as to them shall seem best.*"

The power of sale is clear; the manner and terms are discretionary with the trustee.

There is no particular significance attached to the words, "said trustees," nor to the fact that the testator provided for the contingency of non-acceptance by his trustees named, nor for the resignation or absence of one, what should be done. It may readily be conceded that the testator clearly was providing for contingencies during the life of the trustees named. This is unimportant, I say, because the testator had made and constituted trusts to run through the lives of three classes of persons, and the powers and duties connected with these trusts must be exercised throughout the life of the trusts by the person or persons occupying the office of trustee.

All of the powers and duties conferred upon the trustee named in the will, such as the collection of rents, the payment to each child his share upon the death of his father, from a consideration of the whole will, are annexed to the office of trustee. No one would question this.

And the power of sale and reinvestment of the funds, and the use of the proceeds for the same purposes as in the other trusts, clearly show that it is annexed to the office.

William Neil, trustee, has power to make the sale and conveyance according to the will, and without any order of court.

A decree quieting title of plaintiff may be drawn.

PROSECUTION FOR FAILURE TO PROVIDE FOR MINOR CHILDREN.

Common Pleas Court of Licking County.

STATE OF OHIO V. RALPH BAKER.*

Decided, September Term, 1916.

Parent and Child—Failure to Provide for Minor Children May be Charged in One Count—Voluntary Care of a Child by Another Relieves a Delinquent from the Charge of Failure to Support.

Where an indictment charges failure on the part of the defendant to support his two boys under sixteen years of age, and it appears from the evidence that by consent of all the parties in interest one of the boys is being supported and in a proper manner by his grandparents, but no such voluntary support has been given the other boy and there has been a failure on the part of the defendant to provide him with a proper home, food and clothing, a judgment may be entered acquitting the defendant with respect to one of the boys but finding him guilty with respect to the other, notwithstanding the charge as to both is contained in one count.

J. W. Horner, Prosecuting Attorney, for plaintiff.

Kibler & Kibler, contra.

FULTON, J.

In this case a jury was waived and it was submitted to the court upon the testimony, which was to the effect that Ralph Baker has two children, and these two children are the ones which it is claimed in the incident he has failed to support. One of them is named John Baker, fifteen years old; the other Russell Baker, aged five years. The evidence shows that as far as John Baker is concerned, the defendant is not guilty. John Baker was supported, as the evidence shows, by his grandparents. I think they are the grandparents, but anyhow it was some one who voluntarily did it, and willingly did it, and this child was no charge upon the wife or anybody else, but by the consent of all parties he seemed to live with these parties and they were

*Affirmed, *Baker v. State of Ohio*, 27 C.C.(N.S.), —.

taking care of him and boarding and clothing him and sending him to school, so that they performed all the parental duties that belonged to the parents, and by their consent John was thus supported. But as to Russell the case is entirely different. He is only five years old, and there is nothing to show that Ralph Baker was doing anything towards supporting him.

It is argued by the attorney for the defendant that because the court would be compelled to find that there is no evidence showing that the defendant failed to support John Baker, that therefore the court could not find him guilty of not supporting Russell Baker, but would be compelled to find him not guilty as charged in the indictment. The court does not think that that is so. For instance, if a person were indicted for stealing seven hogs and if the proof showed that he stole six, could any one say that he should go free because the indictment charged him with stealing seven and the proof only showed that he stole six? I do not think that that would be the law. The evidence clearly shows that nothing was done by the defendant towards supporting this five-year-old boy; and the court finds he is guilty under the indictment for not supporting the five-year-old boy named Russell. Unless he makes arrangements by which he furnishes support to this minor five years old, there will have to be an order according to law in that matter.

By Edward Kibler, Sr.: Did the court consider whether it would not have been necessary to have had separate counts in the indictment?

The Court: It might have been better, but I do not think it is fatal.

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AS TO THE CENSORING OF MOVING PICTURE FILMS.

Common Pleas Court of Cuyahoga County.

**THE EPOCH PRODUCING CORPORATION v. HARRY L. DAVIS, MAYOR
OF THE CITY OF CLEVELAND, ET AL.**

Decided, April 10, 1917.

*License—Affirmative Character of the State Law—Creating a Board of
Censors as a Part of the Industrial Commission—Mayors May be
Enjoined from Interfering with the Exhibition of Licensed Films—
“The Birth of A Nation” Under Judicial Review.*

An order issued by the state board of censors permitting the exhibition of a moving picture film can not be questioned, even in a home charter city having an ordinance covering the same subject, except by application to that board for a review of its action, or by bringing suit in the Supreme Court to have the order amended, vacated or set aside.

FORAN, J.

This is an action for an injunction, brought by the Epoch Producing Corporation and others against the mayor of the city of Cleveland and others. Answers have been filed and the case is being tried as upon final hearing.

It appears from the pleadings that the plaintiff owns and controls the property of a certain photo-play called “The Birth of a Nation.” That on the 1st day of February, 1917, after careful examination, the Industrial Commission of the State of Ohio and the Board of Censors of the State of Ohio approved said play and granted the plaintiff a certificate of censorship to the effect that the play was of a moral, educational and harmless character; that on February 5th, 1917, the plaintiff entered into a contract with the Euclid Avenue Opera House for the exhibition of said photo-play in the city of Cleveland, said exhibition to commence on the 9th of April, 1917, and to continue for an indefinite period; that on April 2d, 1917, the city council of the city of Cleveland, by resolution, protested against the public exhibition of said photo-play; and that thereafter

on the 3d of April, 1917, the defendant, Harry L. Davis, as mayor of the city of Cleveland, wrote a letter to the manager of the opera house informing said manager that he had instructed the director of public safety to take the necessary steps to prevent the exhibition of the play in the city of Cleveland, Ohio. Therefore an injunction is asked to prevent the mayor, the director of public safety and the chief of police from preventing the exhibition of said play.

The city filed an answer admitting many of the allegations in the petition, but claiming that it was the duty of the mayor of the city, under Section 72 of the charter of the city of Cleveland, to act as the chief conservator of the peace within the city, and that the photo-play in question was one that was calculated to and had a tendency to excite and create a breach of the peace, and therefore was in conflict with Section 1770 of the revised ordinances of the city; and for that reason the mayor, acting as the conservator of the peace of the city, did issue an order prohibiting the exhibition of said photo-play, because, if exhibited, it would have a tendency to create and would probably result in a serious breach of the peace; that certain scenes in said photo-play were calculated to cast disgrace upon a large body of self-respecting and law-abiding citizens of the city, and that certain scenes in the play either depict or suggest acts and operations of certain men organized in a conspiracy, secret or otherwise, against law and order and in defiance of governmental authority.

The issues involved in this proceeding are to be governed by the iron rule of legal exegesis, and not by any question of sentiment or expediency. Back of it there may be an underlying suggestion that is political in character, but with this the court can possibly have no concern, as the court must pass upon the issues upon the facts presented and the rules of law prescribed. By this I mean no reflection upon the mayor of this city, whose motives I believe undoubtedly above suspicion.

Sunday evening, at the invitation of counsel for the plaintiff, I witnessed the photo-play, the production or exhibition of which is sought to be enjoined in this proceeding. If I had known in advance as much as I now know of the character of

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this exhibition, I could not have been induced by any consideration to witness it.

In the house of memory in which we all live there is a room wherein no one enters save the occupant. For some three hours the door to that room stood open, and out of the abysmal past arose specters that I never expected to see again. In this room "Memory in widow's weeds, on naked feet, stands on a tombstone."

Half a century ago the "memory in widow's weeds" invoked harsh and bitter thoughts; but time steals something from us every hour, and eventually softens, if it does not efface, the bitterness of impressions made in the long ago; so that the thoughts inspired by the scenes I witnessed were tinged with sadness or sorrow and regret rather than with anger or animosity. It is sad now to recall that the War of the Rebellion was necessary in the evolution of the American Republic toward higher idealities and grander realization of human perfection and achievement; and surely it is a matter of regret that men should now seek to capitalize the harrowing scenes of that eventful period in our history. In this production we see reflected a phase of the law of compensation, that immutable law which always has and ever will balance good and evil.

Many of the laws or rules of human conduct, upon which society is based and which pertain to the universe of morals, are mere reflections of immutable physical laws, or perhaps the physical laws grow out of these laws pertaining to the universe of morals. In mechanics the law of compensation means a balancing of forces, such as we see in the law of diminishing returns. So, too, in the moral world we have the law of compensation, a balancing of good and evil. Sowing has its inevitable consequences and concomitant in reaping. If we sow virtue, we reap perfection. If we sow the wind of evil, we reap the hurricane of destruction. The past and present are storehouses where reward and punishment are laid away for the future. The ancients understand this law, and sometimes gave it a very practical application, as in Lex Talionis. Often the wrong-doer escapes the physical penalty; but for the wrong or injustice atonement must be made sometime by somebody. Retributive

justice may travel with a leaden heel, but she never fails to strike, and when she does strike she strikes with an iron hand. The Hindus call this law Karma. The Greeks symbolize it in one of their deities, Nemesis, who was the Goddess of Justice and Divine Retribution. She personified the allotment to every man of his precise share of good and evil. If any man practiced evil, wrought injustice, or was too much uplifted by prosperity, it was the mission of Nemesis to punish him and to humble and reduce him. It was her province to enforce the law of compensation, the law of balancing in the social and moral economy of the universe. A nation or a community is simply man in multitude; and when a nation or its people act, the act is that of the whole or aggregate as well as the act of each. Hence the law of compensation, retributive justice or Nemesis, applies to nations and people with the same force and effect that it applies to individual man. Man's conception of this law harks back to the time he began to emerge from the mists and the shadows of legend and myth. It is most strikingly exemplified in the Vicarious Atonement. The curse of original sin was balanced by the crucifixion and agonizing death of the Son of God.

In the Declaration of Independence as first written by the immortal Jefferson will be found this fearful arraignment of the king of England: "Because he waged cruel war against human nature itself, in enslaving a distant people who never offended him, and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither."

This paragraph was stricken out at the instance of the slave-holding aristocracy of the South, and the black spotted curse of human slavery was mockingly perpetuated under the shining folds of the starry flag. When the old Liberty Bell at Philadelphia proclaimed liberty to all the world and the inhabitants thereof on July 4th, 1776, many heard in its clarion, silvery tones an angel song of joy that circled the world; but all detected in this song of joy the doleful clanging of the black man's chains. With liberty were sown dragon's teeth. About eighty odd years thereafter Nemesis brought forth her Jason in the person of the greatest of all Americans, Abraham Lincoln, who destroyed the armed men who sprung from these dragon's teeth.

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The law of compensation is one of the instrumentalities in the Divine Economy. Down deep in the heart of a liberty-loving nation there is, as Carlisle said, a smoldering fire; and woe be to the man who gives it vent. When Sumpter was fired upon this smoldering fire was given vent, the dogs of war loosed, and death and havoc stalked through the land. Retributive justice was slow in striking, but she struck with the crashing and crushing force of a thunderbolt. The South was devastated and ruined; but she brought upon herself the curse, and ought not now to be heard to complain.

The photo-play known as the Birth of a Nation deals with and seeks to reproduce in vivid moving pictures the scenes of strife, confusion and social chaos pertaining to what is known as the reconstruction of the states that had seceded from the Union. The name of this photo-play is a misnomer. It ought to be called the "Phoenix of Liberty Arising from the Ashes of Treason."

The reconstruction period in our history is one that no patriotic man or good American now recalls with pride. There were two contending forces, each fully persuaded the salvation of the country depended upon the theory or point of view it advocated. That each was in some measure right, but in large measure wrong, is now conceded by all impartial students of history. After the collapse of the rebellion, the financial and economic condition of the South was extremely desperate. The country was a devastated, disorganized ruin. Railways, bridges and all means of transportation had been destroyed. All securities were valueless. The currency and banking system of the country was in a state of chaotic disorganization. The season for planting crops had almost passed, and the means of planting seed and the seed itself were difficult to obtain. Thousands upon thousands of a recently emancipated race were without work, food or raiment, and were largely dependent upon the meager supply of sustenance furnished by the United States Army. These people, from whom the chains of servitude had just fallen, were made the pawns of war maddened political factions north and south. During the war party lines in the North were obliterated, and the only party that had any reason

for its existence was the party that kept step to the music of the Union. But shortly after the war party lines began to be reasserted, and the question of enfranchising the emancipated race became overshadowing and dominant. Before the war a colored person was classed, under a southern made provision of the Constitution, as three-fifths of a human being. By emancipation the colored person became a whole human being; and this necessarily increased the representation in Congress of the southern states. The radicals in the North, fearing lest the South might again become dominant, desired above all things to enfranchise these people. The old Democratic Party, north and south, believed that, with the accession of this large vote, the Republican Party would be permanently entrenched in power for perhaps a century to come. Hence arose a divergence of opinion and a clash of political ideas. And this contest grew so bitter that I, who was a participant in many of the scenes I witnessed last evening, was frequently of the opinion that the rebellion did not end at Appomattox. Between the Freedman's Bureau on the one hand, with its horde of hungry carpet-bagging agents, and the Ku Klux Klan on the other with its slogan of terrorism, the lot of the colored man was indeed sad and pitiable. The wonder is that the country emerged as readily or as quickly as it did from the saturnalia of political exploitation and racial hatred that threatened to destroy law, order and liberty south of Mason and Dixon's line. The carpet-bagger, for reasons and purposes of his own, treated the emancipated race as an equal. The southern man, who had before and during the war treated these people as mere chattels, found it extremely difficult to meet his former slaves on a plane of equality. Herein the southern man made his great mistake. If he had treated the colored man as an equal, at least before the law, he would have destroyed the influence of the northern carpet-bagger and the so-called scalawag of the South. Liberty is an intoxicant to a recently enslaved man; but the colored man became no more intoxicated by this draught of liberty than did the French during the French Revolution. Indeed, the intoxication and drunkenness of the French on liberty produced a saturnalia of crime that horrified mankind and shocked the sense of humanity

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the world over. The wonder is that the colored man was as calm and as quiet as history shows he was, under all the circumstances. There were wrongs on both sides; but no one now seeks to condone the extreme views and measures of Thaddeus Stevens, who is parodied as Stoneman in the photo-play; and the southern historian, William Garrott Brown, admits that the Ku Klux Klan often resorted to violence, and that negroes as well as carpet-baggers were whipped and flogged and murdered. He further admits that the incidents related by Tourgee in "A Fool's Errand" have their counterpart in testimony before congressional committees and courts of law. Such works as "The Clansman" or "The Fool's Errand" really serve no useful purpose; but man will be man through all eternity, and appeals will always be made to passion, bias and prejudice so long as money can be coined out of these appeals.

The claim that "The Birth of a Nation" is historically accurate is seriously made by the plaintiff. This may be true in a measure so far as the scenes depicted are concerned; but no man having any regard for historical fact will contend that the whole truth is told; and, so far as it is told, it is sadly twisted and distorted. The monograph or scenario of the play has a sectional slant and bias. It is tinged with the viewpoint and bias of the man who wrote it; and evidently he is not far enough removed from the period of which he writes to be wholly unaffected by environment. It must be admitted that novel writers and dramatists are often romanticists who draw largely upon their imagination for facts. An historical drama absolutely true to fact would be a stale, flat and unprofitable venture for a theatrical manager or producer.

While I am fully persuaded this photo-play is not educational or productive of patriotic outbursts of enthusiasm of a united people, and while I can see many reasons why its production was a mistake, and that its exhibition will serve no useful purpose, yet I can see no reason why broad-minded men should permit themselves to be disturbed by it. The modern dramatist or writer of scenarios is not a classicist, nor has he an exalted conception of the real province of romanticism. The ordinary theater-goer pays his money to be amused, not to be

educated, socially benefitted or morally improved; and the manager caters to the base passions and the hedonistic, and not to the classical taste of the community. Men prefer to see the foibles and idiosyncracies of their neighbors exploited rather than to see the mirror held to nature when it exposes their own sins and short-comings. Hence we have the stage Irishman, the stage Hebrew, the stage colored man and the stage German in unseemly and grotesque caricature, which, if taken seriously, frequently reflects odiously upon the racial characteristics of these people; but these crude, clownish exhibitions appeal only to ignorant, depraved, satiated pleasure seekers. A real man is disgusted by them.

It is claimed by the plaintiff's counsel that this photo-play projects upon the screen of today the colored man as he appeared emerging from the horrors and shadows of slavery, and is not intended to depict the race as we find it today. Admitting this to be true, what useful educational purpose is served by showing us a race in "widow's weeds, with naked feet, standing on a tombstone"? Of course, the colored race as we see it today is not to be measured by that race as it emerged from the brutal serfdom of the southern plantations.

About thirty-seven years before the Revolutionary War, Governor Fletcher, of the Colony of Virginia, issued a proclamation in which he said, among other things, that he thanked God there were no schools, newspapers or periodicals in the colony, as these things had a tendency to make the people dissatisfied, and therefore they were an abomination.

Obviously the southern planters did not educate the negro or give him an opportunity to acquire the art of reading and then place in his hands books, newspapers and periodicals, for surely such a course would tend to enlighten the slave and cause discontent, and this the slave owner sedulously sought to prevent; but fifty odd years of freedom, schools and changed social environment have wrought wonders for this people. We now find them prominent in agricultural, mercantile and industrial pursuits. In all the professions they have challenged the supremacy of the European and his descendants, and are holding their own. Races who boast their civilization extends back to

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the time man emerged from the shadows of barbarism meet the colored man, only recently emancipated, in competition in all the avenues of trade, commerce, literature and social life, and find him a competitor worthy of admiration and respect. Indeed, it must be admitted that this race has made more progress in fifty years than some of the races of southern Europe have made in three hundred years.. It seems to me that, with this wonderful progress and achievement to their credit, the men of this race can, like the rest of us, afford to laugh at and ignore the gibes of the clown and the sneers of the unthinking rabble.

It is somewhere said of an old saint that he was informed of certain slanders that were in circulation concerning his character and standing in the church; and it was suggested that he ought to take prompt and energetic measures to suppress these libelous or slanderous utterances. It is said that the old saint replied that if the things said concerning him were true, he ought not to be heard to complain; but if they were not true, then he should, by leading the most exemplary life and by conduct above reproach, convince his neighbors by his conduct and by his acts, rather than by words, that the slanders were false, groundless and untrue. I often think this would be a good course for all of us to follow.

Turning now to the incidents of this play, it may be said without fear of contradiction that scenes are depicted which have but very slight foundation in fact, if any at all. The purpose of the man who wrote the book "The Clansman," or the man who wrote the scenario based upon this book, is evidently not above suspicion. That it was wholly disinterested and patriotic will hardly be admitted by any student of history. A single incident in the play will suffice to show the bias and bent of the author's mind and the purpose in view. The character of Flora Cameron, from the very inception of the play, is prominently in the foreground. Indeed, this character seems to be the *deus ex machina* of the whole play. This character is so drawn that the audience must necessarily become interested in the figure or character. The sprightly naivette of Flora and her charming innocence and childish exuberance of spirit is well calculated to cause the audience to become sympathetic and fall in love with

the character; and evidently all this is done for the purpose of causing the audience a severe shock and jolt by her tragic death. In this respect I am free to say that I think the photo-play is inartistic and stagey, and that this character is a dramatic or stagey trick to serve a sinister purpose. Besides, it is a travesty on historical fact, or at least a gross and misleading exaggeration. It is now well known to all writers of history, and it is especially well known to us who were participants in this great drama, that the southern men left their wives and mothers, their daughters and their sisters and their women generally in charge of and under control of their faithful slaves while they went to the front, and with all the power at their disposal sought to destroy their country. They had full confidence that these slaves would protect the lives and the virtue of their wives, their daughters, their mothers and their sisters; and I know of no incident during that tragic period where this confidence was misplaced or betrayed. On many occasions when in front of Petersburg the cavalry division to which I was attached made extended raids into the enemy's country south of Petersburg; and I can now distinctly recall that whenever we came to a plantation house or farm house the old colored men stood guard over these houses and their inmates until such time as the officers placed a guard of Union soldiers around the house or plantation; and the loyalty and devotion of these slaves to their mistresses and the women of their master's household was a matter of common, every-day observation among the Union troops. It is barely possible that after the southern men permitted the adventurers and demagogues from the North to sow the seeds of distrust and suspicion among the colored people this loyalty and devotion was to some extent lessened; but, as I have said, if the southern men themselves had accepted the situation in good faith, and had treated their former slaves with even a semblance of equality, the voice of the carpet-bagger would have fallen upon deaf ears.

The character of Silas Lynch, if it is intended to represent John R. Lynch of Mississippi, is not only a caricature and a travesty, but a falsification of history. John R. Lynch was so well thought of by his friends in the Republican Party that

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he presided as the temporary chairman of the convention that nominated James G. Blaine for the presidency. This man was regarded, as I personally know, by all who knew him as a gentleman, a scholar and a law-abiding citizen. The make-up of this character, however, rather seems to intimidate that it is intended to represent Senator Bruce of Louisiana. This man I knew personally in Washington, and can say without fear of contradiction that if it is intended to typify Silas Lynch as a representative or embodiment of Senator Bruce, the character is not only overdrawn, distorted and a travesty, but it is absolutely false and untrue.

During the performance or exhibition I was somewhat impressed with the fact that there was a great deal of prominence given to the music or air of Dixie Land, and the music of the Star Spangled Banner is noticeable by its absence. This omission and this prominence of Dixie Land can perhaps be condoned or overlooked by the old soldiers for the reason, as Mr. Lincoln said, that the Confederates stole Dixie Land, which was a northern air written by an Ohio man, Emmett, and that inasmuch as we recovered it at Appomattox, it is now as much our air or as much our song as it ever was that of the Confederates, if not more so.

I think it must be admitted that this presentation of a forgotten era is an apology for conduct and for acts that can not be commended or condoned. And even if we admit that right after the war the colored people got drunk on liberty, and while in this intoxicated condition committed acts that can not be commended or condoned, yet I can see no good reason for now calling attention to these things. And if every man felt as I did about it, this play would be exhibited to empty seats at the opera house.

But the question before the court is not one of sentiment, it is not one of personal inclination, it is a question of law pure and simple. Will the exhibition of this photo-play have a tendency to provoke a breach of the peace? Certainly, so far as law-abiding citizens are concerned, such a tendency does not exist and can not be seen; and I am frankly of the opinion that the only way to treat this so-called drama is to treat it with

the silence of contempt. Indeed, the colored people of this country, by their attitude toward this play, have done more to make it a money-making success than all the other advertising it has received. By their conduct and by their attitude they are saving the management thousands upon thousands of dollars in advertising. It is ephemeral in character; and while it is now claimed that several hundred thousand people, if not several million, have witnessed this play, yet it will not be heard of or known of a few years hence, and will be buried in the limbo of forgotten things. In other words, it will fall into the well-merited obscurity out of which it should never have arisen.

To admit that this photo-play tends to provoke a breach of the peace is to confess that citizens of African descent are not law-abiding citizens. This I am not willing to admit, as it would be an uncalled-for slander upon these citizens. A "tendency to provoke a breach of the peace" does not mean a manufactured tendency, but rather it means, as applied in this instance, something the natural effect and tendency of which would be to unconsciously and spontaneously cause men to lose control of their reason and permit passion and anger to dominate judgment. The very absurdity of the travesties presented by this play precludes such a possibility upon the part of men of reason and of common sense. The play, taken as a whole, has no real artistic merit; nor has it any historical or educational value. It undoubtedly has a spectacular and sensual appeal, such an appeal as the Circus Bavimus or the Coliseum afforded the Roman populace under Nero and Caligula.

I sympathize with the people who oppose the exhibition of this film. These people have all the mysticism of the Slav and all the sensitiveness of the Celt. Their extremely sensitive nature is often a detriment rather than a blessing. They sometimes feel any restraint of collective or individual action is a racial or color discrimination. This is a mistake, except in so far as the self-conscious holier-than-thou fool is concerned. The real man, no matter of what race or creed, knows that mind is the supreme law of human destiny, and that all men are to be measured by mind and character. This is a divine conception. When the people of Israel clamored for a king, God, in direct-

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ing his prophet to find a suitable person to be king for these people, cautioned him that while man looked upon the outward appearance, God looked only upon the heart. To Tilman Joy the soul of Banty Tim was as white and noble as ever resided in the body of man; and any man who does not feel as Tilman Joy felt is an unspeakable ass, unworthy of consideration or notice. Whenever I see the sneering look of a Pharisee or hypocrite, I feel like repeating the lines of an old French poem which, freely translated, ran:

“The noise is for the foolish; the complaint is for the stupid. The honest man, deceived, goes his way and says no word.”

Whatever views the court may have as to the expediency or propriety of this photo-play or exhibition, as was said in the beginning, the court must be governed by the iron rule of legal exegesis, and not by any question of sentiment or personal predilection.

Learned counsel for the city, in their argument, contend that because of the home-rule amendment to our Constitution, the city has full power and authority, through its mayor, to act as the chief conservator of the peace within the city, and to supervise the administration of the affairs of the municipality and see that the ordinances are enforced.

The amendment giving to municipalities the power of local self-government or home rule prevents the exercise of that power if it be in conflict with the general state statutes or laws. Freeholder charters have been liberally construed by courts of last resort in favor of the municipality, the courts going so far as to hold that under these charters a city may pass any ordinance relating to a municipal affair that the state itself might enact under its Constitution. In other words, the Legislature has power to confer by statute upon the mayors of municipalities the duties of censorship respecting the production of plays, including moving picture exhibitions; and in the absence of any state law in relation to censorship, a city acting under a home-rule charter undoubtedly has authority and power, by ordinance, to provide for censoring plays and theatrical exhibitions. The state has seen fit, however, by a general law to locate the

power of censorship in another body, and therefore the exercise of this power is forbidden to municipalities acting under home-rule charters. It is claimed that the acts of the mayor, so far as they relate to the preservation of law and public peace, can not be enjoined. This is true if the mayor is acting in a purely ministerial capacity. A ministerial act may be said to be a simple definite duty arising under conditions admitted or proved to exist and imposed by law. Under such conditions there is no exercise of judgment by the mayor upon the propriety of the act to be done. But the proposed act of the mayor is not a ministerial act within this definition. The duty which it is said the mayor is about to perform can not be said to arise under conditions that are admitted or have been proved to exist; nor can it be said that the power he is proposing to exercise is a power imposed by law irrespective of the exercise of his discretion or judgment upon the propriety of the contemplated act.

If the act of the Ohio Legislature creating a board of censors provided for an appeal to this court, much of the law cited by counsel would be appropriate; but, unfortunately for the position taken by counsel, the Legislature did not provide in the statutes in question for an appeal to this court. In the case cited by counsel for the plaintiff, being the case *In the Matter of the Franklin Film Manufacturing Corporation*, found at page 422 in the 253 Pa. St. Reports, it is provided in the first syllabus that:

“Under the act of May 15, 1915, P. L., 534, Section 26, creating a state board of censors of motion pictures, ‘that a right of appeal from the decision of the court to the court of common pleas of the proper county,’ the decision of the board of censors can be reversed by the common pleas court only where there is a finding that the censors were guilty of an abuse of discretion.”

It will be seen here that the Pennsylvania act creating a state board of censors expressly gives a right of appeal from the decision of the board to the court of common pleas of the proper county. The Ohio act does not give this right of appeal. And this brings us to a consideration of the Ohio act. But before referring to these statutes it may be well to indulge in a few gen-

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eral observations respecting the common and ordinary meaning of the word censor.

Originally a censor was a Roman magistrate who was a rigid judge of morals and whose power was absolute. In the etymology of the word, as it comes down to us, there lurks the dominant idea of an arbitrary assignment of powers and duties; and it may be said that this idea of discretionary power in the censor has never been wholly lost. In American constitutional history we find censors were provided by the organic law of Pennsylvania as late as 1790, and in Vermont as late as 1870, when they were abolished by the constitutional convention of that year. The powers of these censors to inquire into the conduct of state officers and the working of laws and departments of government were not only discretionary, but practically absolute. In Vermont they had power to call constitutional conventions if they believed amendments to the Constitution necessary. In England the power of censorship as to plays and theatrical productions is vested in the Lord Chamberlain and his deputies. His powers in this respect have always been absolute—so much so that when the bill of 1773 became a law, Lord Chesterfield said in opposition to it that “if the players are to be punished, let it be by the laws of their country, and not by the will of an irresponsible despot.”

This law and the act of 1843 was in active force until 1909, and in most respects is still in force.

By the terms of these acts, a copy of every new play and every addition to an old play had to be sent to the Lord Chamberlain; and if he did not forbid it within seven days, it could be represented or produced; otherwise not. A joint committee in 1909, however, recommended that it should be optional with an author to submit a play for license and legally to perform an unlicensed play, whether submitted or not, the author, however, taking the risk of police intervention if the play did not meet the approval of the Lord Chamberlain. The committee also recommended that “the reasons for which a license should be refused should be indecency, offensive personalities, the representation in an invidious manner of a living person or a person recently dead, violation of the sentiments of religious reverence, the presence

of anything likely to conduce to crime or vice, or to cause a breach with a friendly power or a breach of the peace.”

This language is strikingly similar to the statutes cited by the learned counsel, Mr. Martin, in his argument.

I only refer to these matters for the purpose of calling attention to what the Legislature of Ohio had in mind when it enacted the censorship statutes. These statutes, as found in Volume 1 of the supplement, beginning with Section 871-46, provide substantially:

1. That there shall be created, under the authority and supervision of the Industrial Commission of Ohio, a board of censors of motion picture films.

2. It shall be the duty of the Board of Censors to examine and censor, as is provided in the statutes, all motion picture films to be publicly exhibited and displayed in the state of Ohio.

3. Only such films as are, in the judgment and discretion of the Board of Censors, of a moral, educational or amusing and harmless character shall be passed and approved by the board.

4. When a film has been censored by the Board of Censors, a certificate showing the approval or rejection of such films shall be issued to the party submitting the film. The board is authorized to recall any film for re-censor, or to revoke any certificate permitting exhibition of any film in the state of Ohio, whenever in the judgment of such board the public welfare requires it.

5. The Board of Censors may work in conjunction with any censor board or boards of legal status of other states as a censor congress, and the action of such congress in approving or rejecting films shall be considered as the action of the board.

6. By Section 871-52 it is made a misdemeanor punishable by a fine of not less than \$25, nor more than \$300, or imprisonment not less than thirty days nor more than one year, to publicly exhibit or show any motion picture within the state of Ohio unless it shall have been passed or approved by the Ohio Board of Censors or the congress of censors; and a justice of the peace, a mayor or police judge shall have final jurisdiction within his county in a prosecution for a violation of the provisions of the statute relating to the regulation and censoring of motion picture films.

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7. By Section 871-53 it is provided that any person in interest being dissatisfied with any order of the Board of Censors shall have the same right and remedies as to filing a petition for hearing on the reasonableness and lawfulness of any order of the board, or to set aside, vacate or amend any order of the board, as is provided in the case of persons dissatisfied with the orders of the Industrial Commission.

In an opinion by the Attorney-General found in Volume 1 of the opinions of 1914, at page 1048, it was held that any person in interest who was dissatisfied with any order of the Board of Censors could make his application to the Board of Censors for a revocation of the order or the amendment of it, and not to the Industrial Commission; clearly indicating, in the opinion of the Attorney-General, that the Board of Censors created by the statute had extraordinary and discretionary powers, subject only to review in the manner provided by law for the review of the decisions and orders of the Industrial Commission; and this review can only be had in the Supreme Court, in accordance with Section 871-38, General Code.

The Board of Censors is created by authority of the Industrial Commission; and it is provided by Section 871-25 that all orders of the Industrial Commission in conformity with law shall be *prima facie* reasonable and lawful, until they are found otherwise in an action brought for that purpose pursuant to the provisions of Section 41 of the act, or Section 871-41, G. C., or until revoked by the commission; and, of course, this applies to all acts of the Board of Censors, as that board is created by the Industrial Commission and is really a part of the commission.

By Section 871-38 it is provided that any person in interest who is dissatisfied with any order of the commission—and, as we have seen, this includes any order of the Board of Censors—may commence an action in the Supreme Court of Ohio against the commission as defendant, to set aside, vacate or amend any such order, on the ground that the order is unreasonable or unlawful. By the provisions of this section the Supreme Court “is authorized and vested with exclusive jurisdiction to hear and determine such action.”

It therefore clearly appears that when the Board of Censors, which is part of the Industrial Commission, has made an order or given a permit or a license permitting the exhibition of a motion picture film, this order can not be questioned in any way, except as is provided in these statutes, and that is by an application to the Board of Censors to review its own action, or by commencing an action in the Supreme Court of Ohio to have the order set aside, vacated or amended. The language of the statute is clear and explicit that the Supreme Court is vested with exclusive jurisdiction to hear and determine any action which any person in interest who is dissatisfied with an order of the Board of Censors may bring to have that order vacated, amended or modified. We think there can be no question as to the soundness of this view. The statutes creating a Board of Censors are what may be termed affirmative statutes; that is, statutes enacted in affirmative terms, and they are not in derogation of common law; and it is a well settled rule of legal interpretation that if an affirmative statute which is indicative of a new law direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner. See Potter's Dwarrris on Statutes and Constitutions, page 72, and cases there cited. This learned author on the same page also says:

“If a new power be given by an affirmative statute to a certain person by the designation of that one person, although it be an affirmative statute, all other persons are in general excluded from the exercise of the power, since *expressio unius est exclusio alterius*.”

Section 871-53, providing that any person in interest who is dissatisfied with an order of the Board of Censors shall have the rights and remedies as to filing a petition in the Supreme Court for a hearing on the reasonableness and lawfulness of any order of the Board of Censors, or to set aside, vacate or amend such order, as is provided in the case of persons dissatisfied with the orders of the Industrial Commission, was held in *Mutual Film Corporation v. Industrial Commission of Ohio*, 205 Federal Reporter, 138, to give sufficient protection against an arbitrary or

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unreasonable action by the Board of Censors. This case was affirmed by the Supreme Court of the United States in 236 U. S., 230.

If this section of the statute gives sufficient protection against arbitrary or unreasonable action by the Board of Censors, there is no reason why the mayor of the city of Cleveland should undertake to exercise any authority in respect to the matter. Clearly and obviously these sections of the statutes of Ohio give the Board of Censors absolute power and authority to reject or approve any film, and the right of the board to do so can only be reviewed in the Supreme Court of the state of Ohio; and this court must necessarily hold, and is forced to hold, that the contemplated action of the mayor of the city of Cleveland, no matter how well-intentioned such action may be, is without authority and void.

If the court were permitted to exercise its own judgment as to the propriety or the expediency of exhibiting this film, it would undoubtedly say that the photo-play under consideration is neither educational, moral or socially uplifting; and I may further say that, having seen this film exhibited, I could not be again induced, even for a consideration, to witness a performance or exhibition of it. But under the law as I find it, I am constrained and forced, as I have said, to hold that the action of the mayor is without authority, and is contrary to law, and therefore void; and he will be enjoined and the prayer of the petition will be granted.

**STATUTORY RESTRICTIONS ON THE LOCATION OF
A CEMETERY.**

Common Pleas Court of Franklin County.

GEORGE L. FREY ET AL V. WILLIAM C. NOWLIN ET AL.

Decided, March 1, 1917.

Cemeteries—Some of the Statutory Restrictions with Reference to, Construed—Ground Lying in Front of and to be Used as an Entrance to a Proposed Cemetery Forms Part of the Cemetery—Corporation for Profit Not Permitted to Maintain a Cemetery—Injunction Available to a Landowner Within the Prohibited Zone of a Cemetery.

1. The restrictions found in the Ohio statutes render it impossible that a private corporation should engage in the business of platting, conducting and maintaining a cemetery for profit.
2. Land lying in front of and having the same ownership as a tract intended to be used for the burial of the dead constitutes a part of the proposed cemetery where necessary as an entrance way, notwithstanding there are to be no burials therein, but the said front part is to be reserved for park purposes and driveways.
3. Where the purpose to use the land for cemetery purposes is made clear by avowal or otherwise, a property owner residing within the prescribed limit may interfere by injunction, on the ground that the proposed use of the land would be in derogation of his legal rights.

Donaldson & Tussing, for plaintiff.

Timothy S. Hogan, contra.

KINKEAD, J.

This action and another by Eliza A. Woodruff et al against the same defendants, numbered 71279, were brought to enjoin the defendants from locating and establishing a cemetery.

Defendant William C. Nowlin has acquired more than 100 acres of land adjacent to plaintiffs' farms, on which it is proposed to establish a cemetery.

Frey complains that the cemetery is to be located about eighty-eight yards from his dwelling-house without his consent.

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Woodruff and Cherry complain that defendants intend to locate the cemetery within forty-five yards from their dwelling-house without their consent.

The defendant, the Fairview Cemetery Company, is a private corporation organized under the laws authorizing the incorporation of a company for profit. It has an authorized capital stock, and the individuals named as defendants hold the stock. Defendant William C. Nowlin is the president. He admits in testimony that it is proposed that the corporation intends to engage in the business of conducting a cemetery for profit.

The corporation has not yet acquired the land. Defendant William C. Nowlin has purchased about 150 acres and now holds it individually. He admits, however, that it is his purpose to transfer eighty-seven acres to the corporation, to be used by it for burial purposes. The remaining portion of the land Nowlin states he intends to hold in his own name, and that it is to be converted into a park, to be used for park purposes, and for driveways furnishing entrances to the portion of the land to be held by the corporation for burial of the dead. It is to be used in connection with the eighty-seven acres to be held by the corporation. It is conceded and admitted that all the land now held by Nowlin, the eighty-seven acres proposed to be conveyed to the corporation to be used for burial purposes, as well as the remaining portion to be held by Nowlin, is all plotted for general improvement pursuant to the plan to construct and maintain a cemetery. New and extensive plans for draining the lands are contemplated. It is proposed to adopt one general scheme of draining all the lands as an entirety.

As disclosed by the last plan shown, eighty-seven acres is to be used for burials, while the remaining portion—the front part—is to be used for park purposes, with drives and entries to the eighty-seven acres which constitute one composite improvement in clear furtherance of the construction and maintenance of a cemetery by the direct and indirect use of all the land. The dwelling-house located on the portion adjacent to the public road is to be used for housing the keeper of the cemetery. An additional house is proposed to be built in that portion of

the property to be occupied by Nowlin, vice-president and general manager of the company.

It seems quite apparent that an evasion of the restrictions of the statutes concerning the amount of land which a cemetery association may hold is the purpose of the defendants. The legal questions presented are unique and important.

The question naturally arises whether a corporation organized for profit can engage in the business of conducting and maintaining a cemetery for the profit of its stockholders. The stock of the corporation may be bought and sold as may stocks of corporations generally. It is intended to have a sinking fund of ten per cent. of the selling price of the lots for perpetual maintenance, and the burial lots are to be sold with a view to profit for the stockholders. It is admitted to be a money-making scheme.

The corporation, Nowlin states, is practically non-existent as it stands today. But it is determined what Nowlin and the corporation intend to do. He states that he thinks he will reorganize the association under the statute; but he intends to hold the title to the front part of the property.

It is disclosed, therefore, that the front part of the property is to be used in conjunction with the eighty-seven acres which the corporation expects to use for burial purposes. The original plat shows this. It constitutes one general improvement. Though the front part of the property held by Nowlin is not to be used to bury the dead, as he now disclaims, it is nevertheless to be in general aid of and to carry out the purpose of maintaining a cemetery. Clearly this is an attempt to evade the purpose and intent of the statutes regulating cemetery associations.

May a corporation be authorized for profit for the purpose of engaging in the business of conducting a cemetery?

Decision of such a question should, under some circumstances, be made in a quo warranto proceeding. But its consideration, as well as of the corporate rights of the company, seems pertinent and relevant in determining the private right presented by the evidence in this case. It is said that the individuals and

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the corporation are about to invade the rights of plaintiffs.

It is entirely clear that no land can be acquired or obtained nor appropriated for cemetery purposes within 200 yards of a dwelling-house without the consent, in writing, of the owner of the tract of land on which such dwelling-house is situated. Section 3678, General Code.

Nor can a cemetery be *located*, by either an association or incorporated company for cemetery purposes, within 200 yards of a dwelling-house unless the owner gives his consent. Section 10096, General Code.

The purposes of the statutes conferring this right upon owners of dwelling-houses so located, is to restrict any kind of an organization from invading this property right thus distinctly conferred upon owners of property. It is a direct recognition of the legal objections to such location of a cemetery.

Sections 3678, 3442, 10093, 10096 provide for certain restrictions and limitations upon legally constituted corporations or organizations as to appropriating and acquiring land for cemetery purposes.

Sections 3441 to 3475, chapter six of the General Code, relating to cemeteries, are regulatory provisions concerning powers, duties and restrictions upon such organizations as well as of township trustees who are authorized to acquire and hold ten acres for cemetery purposes.

Chapter 6, "Cemetery Associations," Sections 10093 to 10119, has to do with conferring powers and duties and imposing restrictions and limitations upon "a company or association incorporated for cemetery purposes."

These regulations and limitations are binding on any company, however organized, which undertakes to acquire lands for cemetery purposes.

The public character of the undertaking by any company or association organized or incorporated for cemetery purposes is clearly marked by the fact that the power of appropriation or of eminent domain is conferred upon it.

It is provided by Section 10095 that if it be necessary for any such company or association to acquire lands by appropria-

tion such proceedings shall be taken therefor as are provided for the appropriation of property to the use of corporations. Limitations are placed upon such appropriation not permitting lands to be taken upon which there is a dwelling-house, barn, stable or other farm buildings, etc.

All companies or corporations organized for cemetery purposes are prohibited from either acquiring by private contract or from appropriating more than 100 acres of land. Sections 10093, 10094.

Such corporations are not permitted to use their income as are ordinary private corporations. Nor are they permitted to incur debts except in the original purchase of the land, and in laying out, inclosing and embellishing the grounds and avenues, these being limited as provided by Section 10098. Lands thus acquired are forever committed to public burial purposes, being exempt from taxation, execution, attachment or lien. Burial lots sold by such companies or associations shall be sold for interments, *and in no wise with a view to profit*. Section 10101.

The law does not contemplate that they shall be sold in "job lots" long in advance of intended use, with a primary purpose of profit (Section 10101), as Mr. Nowlin admits is his purpose.

Section 10109 provides that:

"No part of the proceeds of land sold, or of the funds of such company or association, shall ever be divided among its stockholders or lot owners. All its funds must be used exclusively for the purposes of the company or association, as herein above specified, or invested in a fund the income of which shall be so used and appropriated."

The manner of holding and investing the money is regulated by statutes (Sections 10118, 10119). Clearly this shows that lands can not be held and sold by a corporation for profit with a view to the profit of its stockholders.

Corporations may be organized for profit, and not for profit. According to Section 8623 of the code, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves. Natural persons can not acquire, own and maintain a private cemetery for their profit. Restrictions pre-

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scribed by Sections 10097, 10102, 10109, 10118 and 10119 clearly make it impossible to incorporate a private corporation for profit for the purpose of engaging in the business of laying out, conducting and maintaining a cemetery.

The admitted purpose of defendant Nowlin, who has acquired and now holds all the property, being to transfer 87 acres thereof to the corporation, and to hold the remainder to be improved, platted and used with the 87 acres for cemetery purposes, to be held and sold in burial lots for profit, it is clear that the 87 acres is intended to be committed to an unlawful use, a use which neither private individuals nor corporations can make of lands held and owned by them.

The court finds as a matter of fact that defendant Nowlin, in conjunction with the defendant corporation, in substance and effect, intends to commit all the lands now held by him to cemetery purposes in circumvention of law.

As an individual, Nowlin has no right to thus commit the front part of the property to cemetery purposes indirectly in cooperation with the corporation.

The evidence discloses that the nearest grave to be located in the eighty-seven acres devoted to burial purposes is more than 200 yards from the dwelling-house of either or any of plaintiffs.

The view taken by the court, however, is that defendants intended to use all of the lands now held by Nowlin for *cemetery purposes*, part directly and part indirectly in circumvention of the statutes.

The use of lands contained in one general plan of improvement for a cemetery, for any purpose in aid of or in furtherance of *cemetery purposes* as contemplated by Chapter 7, General Code, Section 10093, whether for the actual burial of dead, or in aid of such purpose in any portion of the premises, embraced within the general plan by driveways, parks and location of residences and working places, is in effect using such lands for cemetery purposes.

It being the avowed intent to thus use all of the lands now held by defendant Nowlin for cemetery purposes, even though there is no actual burial of dead within 200 yards of the dwell-

ing-houses of plaintiff, as now intended and claimed, still, looking to the substance and effect of the disclosed intent and purpose, to the plan of improvement, considering the apparent attempt to evade the law, and relying upon the general improvement disclosed by the plats in evidence, especially the first one prepared, the court is of the opinion that there is a threatened invasion of the rights given by statute to plaintiffs by defendants Nowlin and the Fairview Cemetery Company, that no land shall be obtained for public cemeteries within 200 yards of a dwelling-house without the consent of the owner, and that a cemetery shall not be located within 200 yards of a corporation.

The finding and judgment is in favor of plaintiffs in the two actions, it being ordered, adjudged and decreed by the court that defendant William C. Nowlin be perpetually enjoined from transferring any portion of the lands now held by him to the defendant, the Fairview Cemetery Company, to be used by it in conjunction with the portion which defendant Nowlin intends to hold in his own name, pursuant to the general plan and plat, in substance and effect as one tract of land for cemetery purposes contrary to the spirit and intent of the law, and in violation of the private statutory rights of plaintiffs without their written consent.

Nowlin and the corporation should not be permitted to indirectly and by circumvention in substance and effect locate a cemetery in contravention of the statutory rights of plaintiff.

It being apparent that a corporation for profit can not embark in the enterprise proposed, the parties should consider carefully their future. The court has carefully considered the question whether it could restrain an individual from deeding property to a corporation not authorized by law to receive it and use it for the purpose intended. But it is concluded that, as the direct purpose is to use all the lands for cemetery purposes, or to locate in substance and effect a cemetery upon all the lands, plaintiffs have the right to enjoin the act, even though the avowed intent be to locate the graves more than 200 yards from the dwelling-houses.

Assuming that the court is justified in treating the threatened and avowed purpose as above stated, it may be observed that

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the right of plaintiffs to relief by injunction is placed upon the ground that the statutes thus conferring the right to object to such location of a cemetery constitutes a direct recognition of the fact that a cemetery so located is in derogation of legal right, if not a nuisance. It is a legal right conferred by statute. It has a tendency to injure the value of property and to impair health. *Henry v. Trustees*, 48 O. S., 671, 674. See *Norton v. Trustees*, 8 C. C., 335; *Payne v. Norton*, 54 O. S., 682.

If lands can not be appropriated upon which there is a dwelling-house, barn, stable, or other farm buildings (Section 10095), a private individual ought not to be permitted to secretly acquire such property as defendant Nowlin did in this case, and be permitted to actually in substance and effect commit it to cemetery purposes in conjunction with a company or corporation acquiring land upon which burial of dead is to be made, where the whole tract, as in this case, is to be generally improved according to one plan or plat as if an entire tract and owned by one company. The location of the cemetery on the eighty-seven acres would be impossible without acquirement of some of the land in the front part. This fact conclusively shows the unwarranted evasion of the statutes proposed.

The original plat shown in evidence divided all the lands held by Nowlin up into burial sections A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R—18 in all. The residence in front is designated superintendent's residence. This discloses the intent to use it all for cemetery purposes. A later plat divides the front property into park sections.

It is clear that a permanent injunction should be allowed. An order may be drawn as above indicated.

SERVICE ON A CORPORATION IN ANOTHER STATE.

Common Pleas Court of Montgomery County.

ROBERT R. DICKEY v. THE DAYTON GLOBE IRON WORKS CO.*

Decided, November 13, 1915.

Service of Summons—Foreign Corporation Incorporated in Ohio Served with Summons in Another State—"Doing Business" and "Transacting Business" Distinguished—Ineffectual Service on a Corporation Officer Transacting Business in Another State.

1. Where an issue is made as to the validity of a judgment set forth in an intervening petition, the court will scan the transcript showing the rendition of the judgment and if a vital defect appears the intervening petition will be dismissed.
2. Failure of the record to show that the defendant was doing business in the state of New York at the time service was had upon its vice-president within that state, is a defect requiring such action.
3. The mere transaction of business by a corporation through one of its officers in another state does not constitute doing business in that state within the meaning of the statute relating to service of summons, and service had upon such officer under such conditions is defective and renders invalid proceedings based on such service.

Lee Warren James, for intervening petitioner.

Benj. F. McCann, contra.

SNEDIKER, J.

In this case an intervening petition has been filed by the Malone Light & Power Company. An issue having been made as to the validity of the judgment set forth in the intervening petition and upon which this intervening action is brought, our first duty is to scan the certified transcript of the record of the case (including the judgment) attached to the intervening petition and offered in evidence. It appears therefrom that the recitations of the petition in which the judgment in question was rendered were "that at all times hereinafter mentioned and for a long time prior thereto the defendant was and still is a foreign corporation, duly incorporated under the laws of the state of Ohio, having its office and transacting business at Day-

*Affirmed by the Court of Appeals February 6, 1917.

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ton in said state of Ohio." Further, that a contract was entered into by plaintiff with the defendant company on April 26th, 1905, whereby the defendant contracted to make and deliver to the plaintiff at Malone, New York, for installment in its plant at that place, a pair of 25-inch American turbine water wheels, with equipment, under certain specifications; that defendant failed to carry out its contract as to development of horse power, etc., resulting in \$13,500 damages to the plaintiff; that after plaintiff had tried out and used the wheels for a long period—two and a half years—defendant removed the wheels and installed others in their place, which were deficient in value, efficiency and consumption of water, to the damage of the plaintiff in the sum of \$4,000. That the plaintiff, acting under the contract, paid transportation, labor and expense in the installation and conveyance of the wheel \$793.61, which was useless and loss to the plaintiff, on which loss \$490.73 was paid by the defendant, leaving due a balance of \$312.88; and the plaintiff prays judgment in all for \$17,812.83.

The summons in the case appears from the record to have been served upon the defendant, the Dayton Globe Iron Works Company, by delivering and leaving with Clarence Folsom, vice-president of said defendant, personally, a true copy thereof, at Malone, New York, on January 7th, 1909.

In its finding of fact the court finds that, as alleged in the petition, "on the 26th day of April, 1915, and for a long time prior thereto, the defendant was and still is a foreign corporation, duly incorporated under the laws of the state of Ohio and having its office and transacting business at Dayton in said state of Ohio," and after making, in defendant's absence, further findings as to all of the facts alleged by the plaintiff in his petition, renders judgment in the sum of \$17,812.88, as prayed for by the plaintiff.

It is apparent from the reading of this record that nowhere does it affirmatively appear that the defendant, the Globe Iron Works Company, was doing business in the state of New York, unless by a great stretch of the imagination that inference should be drawn from the allegations of the petition which recite that the contract was entered into for the delivery and installation at Malone, New York, of the certain water-wheels about

which this controversy originally arose. On the contrary, both the petition and the finding of the court show affirmatively that the defendant was and still is a foreign corporation, duly incorporated under the laws of the state of Ohio, having its office and transacting business at Dayton, in said state of Ohio. This being true, how stands the case with respect to the rights of the plaintiff to recover on its judgment in this state?

Black, in his work on Judgments, Volume II, Section 910, says:

“It is a well-established rule of interstate or international law, that the courts of another state will not receive as evidence of a foreign judgment, in a suit brought upon it, any record thereof which does not show on its face that the defendant, if a foreign corporation, was doing business in that state. This is a substantive, jurisdictional averment that must affirmatively appear and not be left to any inference from the bare return of the officer that he has served an agent of the company.”

In the case of *St. Clair v. Cox*, in 160 U. S. Reports, Justice Field, in passing upon this same question, uses the following language:

“It is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state.”

Also, see *Hazeltine v. Miss. Valley Fire Ins. Co.*, 55 Fed. Rep., page 743.

In the case of *Henning v. Planters Ins. Co.*, 28 Fed. Rep., page 440, the second section of the syllabus reads:

“Nor can parol or other proof of the fact be received in aid of the defective record if the averment” (the averment of doing business in the state) “does not appear therein.”

In the body of this case the court quotes Justice Cooley in the case of *Montgomery v. Merrill*, 36 Mich., 97, as follows:

“We think also that the court was right in rejecting the evidence offered by the plaintiff on the trial to show that Sidney

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Ketchum was in fact the last president of the bank. Jurisdictional facts can not rest in parol, to be proved in one case and perhaps disproved in another. The record must be complete in itself."

From the foregoing it is apparent that the failure of this record to show the fact that the Globe Iron Works was at the time the service of the summons was made upon Folsom doing business in the state of New York, is such a vital defect that this court is not required to render judgment here on the judgment obtained there, nor is it either required or entitled to consider any oral proof offered to make up this defect.

Irrespective of the foregoing, after a careful consideration of all the testimony in the case, we are unable to determine that at the time the Globe Iron Works was in fact "doing business" at Malone, giving that term its proper legal construction; that it was transacting business at Malone, New York, there is no doubt; but as between doing business and transacting business, there is a wide difference. The defendant corporation was not established in any way in New York, in such manner that it might be said to have continuing interests there, or to have put itself in the position of conducting a branch industry or enterprise. The mere fact that Mr. Folsom was there did not take the corporation there. The corporation was still, as alleged in the petition, located and doing business at Dayton, Ohio.

Our finding is against the plaintiff and for the defendant.

EXHIBITION OF FIXED OPINION BY JURORS.

Common Pleas Court of Hamilton County.

LETITIA A. DAUNT V. CINCINNATI TRACTION CO.

Decided, January Term, 1917.

New Trial—Questions Put to Witnesses by Jurors—Indicating They Had Formed an Opinion—Not Ground for Another Trial, When.

The fact that questions put by certain jurors to witnesses might be taken as indicating they had reached a conclusion on the merits of the case prior to the close of the evidence, does not require that a new trial be granted, where the verdict returned is in accordance with the evidence.

COSGRAVE, J.

This matter comes on to be heard on a motion for new trial which sets forth several grounds therefor, none of which, however, has been very seriously pressed upon the attention of the court except the claim of newly-discovered evidence. This claim is supported by affidavits setting forth the nature of the testimony which certain witnesses would have given if they had been called to testify in the case. A careful examination of these affidavits, in addition to other reasons, abundantly satisfies the court that they furnish no sufficient grounds for setting it aside. They are largely hearsay and argumentative in character, and, justly considered, are of no avail as a basis for a new trial.

The fourth reason is alleged to be misconduct of the jury. The record discloses that certain interrogatories were put by two of the jurors to two of the witnesses, one a specialist in neurology and the other the conductor of the car. It is possible that, fairly weighed, the questions put by the jurors might indicate, to some extent at least, a fixed opinion on their part as to the merits of the case prior to the close of the evidence. The court is inclined to accept this as the truth in the matter. No objection was interposed by counsel for plaintiff to either the propounding of these questions or to the answers thereto by the witnesses during the trial. Assuming, however, that it would at least have been more satisfactory if these questions had not been put by the jurors, nevertheless there remains the real material question in the case, whether or not the plaintiff made out her case by a preponderance of the evidence. Conceding to the plaintiff every possible force and effect that the testimony in her behalf calls for, the court is impelled to the conclusion that she not only failed in sustaining her contention by a preponderance of the evidence, but that the greater weight of the evidence was manifestly against her contention.

The court being satisfied that the verdict is in accordance with the evidence, and that there was no prejudicial error occurring during the trial, the motion for a new trial will therefore be overruled.

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DAMAGES FOR BREACH OF CONTRACT TO PURCHASE FLOUR.

Common Pleas Court of Hamilton County.

SHEFFIELD-KING MILLING COMPANY v. THE DOMESTIC SCIENCE BAKING COMPANY.*

Decided, June 30, 1914.

Damages—Rule for Construing Contracts With Reference to Liquidated Damages and Penalties—Contracts Will be Upheld Where the Stipulation for Liquidated Damages Was Fair to Both Parties at the Time it Was Made.

A stipulation in a contract for the sale and purchase of flour, that in case of breach by the vendee the damage suffered by the vendor should be ascertained by using as a basis the price of wheat at the time of the breach rather than the price of flour, must be treated as a *bona fide* agreement as to liquidated damages and not as providing a penalty in case of a breach, notwithstanding the damages resulting would be considerably larger if based on wheat rather than flour.

*S. K. Henshaw, E. R. Donohue and H. L. Hoidale, for plaintiff.
Murray Seasongood and W. A. Rinckhoff, contra.*

NIPPERT, J.

This is an action brought by plaintiff against the defendant, asking for damages by reason of the defendant failing to comply with the terms of a certain contract which was entered into between the parties on the 2d day of August, 1912, and in which defendant contracted with the plaintiff for a quantity of "Gold Mine" flour equivalent to 4,000 barrels, of the net weight of 196 pounds each, and that said flour was to be packed in jute bags, each to contain 140 pounds net weight, making a total of 5,600 packages; under the terms of said contract it was further provided that plaintiff was to ship said flour to the defend-

*Reversed by the Court of Appeals, 24 C.C.(N.S.), 289; judgment of the Court of Appeals reversed by the Supreme Court and that of the Common Pleas affirmed, 95 Ohio State.

ant at Cincinnati at such times as the defendant might direct between October 1, 1912, and March 1, 1913, and that the plaintiff was to allow the defendant, as a deduction from the purchase price, on each shipment the amount of the freight on said flour from Faribault, Minnesota, to Cincinnati, Ohio, and, further, that the defendant was to pay for all flour shipped at the rate of \$4.75 per barrel on the arrival of said shipment at Cincinnati and on being presented with draft for the purchase price, less freight and being tendered a bill of lading therefor.

The contract contained, among other provisions, the following, to-wit:

“Buyer has the privilege, subject to seller’s commission, of extending shipping date from time to time an additional thirty days, subject to a carrying charge of five cents per barrel on flour * * * for each thirty days or fraction thereof, due in advance and payable on demand. Seller shall have three days’ notice of each request to extend shipping time limit.

“If buyer fails to furnish directions for shipment within original contract time or prior to date of expiration of extension, seller may

“(1) Extend contract limit thirty days, subject to carrying charges above specified;

“(2) Ship the goods at his option within thirty days, exercising his own judgment as to packages if same are not specified; or

“(3) Terminate contract, in which case the following is agreed upon as the basis of settlement, viz:

“The actual difference between the highest closing price of No. 1 northern wheat in Minneapolis on date of sale and date of cancellation as shown by the ‘Minneapolis Market Record,’ figuring flour four and one-half bushels of wheat for every barrel of flour, the buyer to reimburse the seller for carrying the wheat at the rate of one cent per bushel per month from the date of sale to date of cancellation, plus two cents per bushel for buying and re-selling the wheat, and two cents per bushel to cover loss of profit, if any, and inconvenience to seller resulting from failure of the buyer to take out flour as per contract.

“Seller is obligated to give buyer five days’ notice of his intention to ship or terminate contract; otherwise he is understood to have extended the contract an additional thirty days, subject to carrying charges as above.

“There are no conditions, oral or otherwise, except as stated herein.

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“Sales made by traveling men or agents are not binding upon this company until acknowledged from our Minneapolis office.”

On or about January 14, 1913, the defendant directed the plaintiff to ship 500 barrels of the 4,000 barrels contracted for, which order plaintiff executed by shipping 250 barrels on January 20, 1913, and 250 barrels on January 23, 1913, making a total of 500 barrels of flour so shipped, and which were accepted and paid for by the defendant.

The defendant failed to furnish shipping directions for the remaining 3,500 barrels of flour prior to March 2, 1913, so that on or about March 6, 1913, plaintiff notified defendant that unless defendant furnished plaintiff with directions for the shipment of all of the remaining 3,500 barrels of flour on or before April 30, 1913, and unless defendant ordered and took out all of said 3,500 barrels of flour on or before April 30, 1913, that the plaintiff would, at the expiration of April 30, 1913, terminate said contract and that on such termination of said contract being made plaintiff would hold defendant liable for loss resulting to it by reason of the failure of defendant to furnish plaintiff with directions for the shipment thereof, as such loss might be calculated under the contract provisions as stated in paragraph No. 3.

On or about April 5, 1913, plaintiff did receive from defendant directions for the shipment of a third carload of flour of 250 barrels, which was shipped to the defendant on April 8, 1913, was accepted by the defendant and paid for, but since that time the defendant has failed and refused to direct the shipment of any more of said flour, and by reason of the failure of the defendant to order out the balance, to-wit, 3,250 barrels, the plaintiff notified the defendant, on May 1, 1913, that the contract had been terminated and further notified the defendant that plaintiff's loss, calculated under provision 3 of the contract, amounted to \$4,259.53, for which amount, with interest at the rate of six per cent., plaintiff prayed judgment.

Clause No. 3 of the contract reads as follows:

“If contract is terminated the following is agreed upon as the basis of settlement, viz.: The actual difference between the

highest closing price of No. 1 Northern Minneapolis wheat on date of sale and date of cancellation as shown by the 'Minneapolis Market Record,' figuring flour four and one-half bushels of wheat to every barrel of flour; the buyer to reimburse the seller for carrying the wheat at the rate of one cent per bushel from date of sale to date of cancellation, plus two cents per bushel for buying and re-selling the wheat, and two cents per bushel to cover loss of profit, if any, and inconvenience to seller resulting from failure to take out flour as per contract."

Counsel for defendant contends that the measure of damages should be the difference in the value of the *flour* at the time the Domestic Science Baking Company at Cincinnati contracted to buy the same, that is, on August 2, 1912, and the value of the flour at the time the contract was violated, while counsel for plaintiff maintains that the terms of the contract set out specifically what the measure of damages should be in case of breach, viz., the difference in the price of *wheat* on August 2, 1912, and April 1, 1913, etc.

We are called upon to interpret this contract. If the contract is one for liquidated damages, then plaintiff's interpretation of the agreement is correct; if the contract is one which would not only make plaintiff whole by reason of its breach, but in addition thereto would penalize the defendant for failing to carry out the agreement, then the contract would provide for a penalty and the proposed interpretation of plaintiff ought not prevail.

The question raised in this case is not without its difficulties by reason of the fact that the basis of fixing the damages is not the difference in price of the *manufactured* article on contract date (August 2, 1912) and the date of its breach (May 1, 1913), but the damage is fixed by the difference in price of the raw material out of which the manufactured article is made.

The law will permit parties to determine by agreement what shall be the damages which he who violates the contract shall pay to the other, but the law does not always sanction or enforce such an agreement. Such damages as have been beforehand agreed upon, if sanctioned by law, are called *liquidated damages*, and plaintiff claims that the case at bar comes within that class.

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But where the parties make such an agreement, but not in such a manner that the law adopts it, then such damages thus agreed upon are a penalty or in the nature of a penalty. The sum agreed upon will be treated as a penalty, unless it is payable for an injury of uncertain amount and extent; that is to say, where, among all the possibilities of injury resulting from breach of contract, it is impossible to select the certain or probable results.

In the latter case, the parties may agree upon beforehand what shall be taken as a compensation, and such an agreement for liquidated damages the court will not set aside unless it is out of proportion to all rational expectation of injury. (See *Parson on Contract*, Volume III, pages 158-161.)

Thus, in the case at bar, the defendant feels that it is being penalized under the terms of its agreement with the plaintiff, Sheffield-King Milling Company, if the court should find that the difference in the price of wheat on the respective dates is to be the basis of compensation for breach. The defendant claims that the price of *flour*, the commodity which it purchased, and not the price of wheat, should prevail.

Both parties to the contract are responsible firms doing a large business in their respective lines—the plaintiff company being an extensive purchaser of the raw material (wheat) which its mills turn into the commodity of flour, of which it produces several thousand barrels every day, and ships it to all parts of the country, mainly wholesale grocers and bakers. The defendant company is a large wholesale baking company, doing an extensive business in southern Ohio, and both the defendant and plaintiff ought to be thoroughly familiar with their respective line of commercial enterprise, its hazards, risks, profits and possible losses.

The defendant company knew, of course, that the plaintiff, being in the business of milling wheat into flour, had to be in the market each day of the year for the purpose of purchasing the raw product for its mill in order to fill the demands of its customers. The plaintiff, on the other hand, knew that under the terms of its contract the defendant company had the privilege and right to call upon it for the full quota of 4,000 barrels of flour at any time on or after October 1, 1912, and in case plaintiff

iff failed to respond or was unable to respond to defendant's demands under the contract that plaintiff would be liable to defendant in damages, though in this instance the method of computing such breach on plaintiff's part was not set out in the agreement. Plaintiff, however, did fix the method by which its damages should be ascertained in case the Domestic Science Baking Company of Cincinnati failed to live up to the terms of the contract.

In this instance the milling company fixed wheat (*i. e.*, the raw material) as its standard for liquidated damages in a contract accepted by defendant, while the baking company contended that the value of flour (*i. e.*, the finished product) should be considered the basis of fixing damages.

In 92 Fed., 486, Judge Sanborn of the Eighth Circuit, in the case of *Kingman v. Western Electric Mfg. Co.*, lays down the following rule for breach of contract of sale of goods to be manufactured:

“The measure of damages for a breach of a contract to purchase personal property is the difference between the market value and the contract price of the property at the time of the breach, if the latter be greater than the former.”

This rule would, no doubt, apply in the case at bar if there had not been an *express* stipulation to the effect that the damages for breach should be the difference in the market price of the raw material, *wheat*, and not of the manufactured article, *flour*, as of August 2, 1912, and May 1, 1913.

That flour is a perishable product is well known and that it is more susceptible than wheat to the changes of heat and cold, wet and dry, to the attacks and ravages of various kinds of insects, is also true. It is also conceded that a milling company would not manufacture 3,000 to 4,000 barrels of flour without an express order for their shipment and run the risk of having the product thrown back on its hands at a place one thousand miles from the company's elevator and thus be compelled to sell the consignment as “distress flour” on the open market at a loss that could not be estimated or foreseen at the time of the making of the contract; while, on the other hand, no such contingency

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as "distress wheat" could arise in the market of a raw material such as wheat.

The parties to this contract met and agreed upon a fixed *method*, not a fixed *sum*, of figuring damages in case of breach. These damages might have come high or they might have been low, all depending on the wheat market of August 2, 1912, and May 1, 1913, or there might not be any damage at all; in fact, there might have been profit accruing to defendant if the wheat market had gone up instead of down. Unfortunately for the defendant, wheat had dropped from \$1.03 per bushel on August 2, 1912, to \$.84 per bushel on May 1st, 1913, and plaintiff's loss on raw material purchased on August 2, 1912, to fill this order of defendant's was severe—firstly due to drop in price of wheat, and, secondly, due to failure of defendant to live up to the terms of its contract. If wheat had only gone down one cent per bushel defendant's loss would have been trivial, but having gone down nineteen cents per bushel his loss was correspondingly heavier, and it is fair to assume that if wheat had gone *higher* than \$1.03 per bushel the defendant would have never repudiated the contract.

One of the tests applied in cases of this nature is whether the amount stipulated for in the contract is greatly in excess of the actual damages or not, and it is held where this test is applied that if the amount stipulated is no greater than the actual damages, or if in excess of actual damages such excess is moderate, the stipulation is for liquidated damages. But where this test is applied it is the facts as they exist when the contract is made and not those in existence when the contract is violated which must be considered in determining whether the amount stipulated for is reasonable or unreasonable. See *Gibson v. Oliver*, 158 Pa. St., 277.

In the case at bar the facts as they existed on the 2d day of August, 1912, were not of such a nature as to lead this court to say, that either the method of arriving at the damages for breach was unreasonable, or that the amount in case of breach would be an unreasonable amount. It was a fair method by means of which the parties could reach by agreement the exact amount in dollars and cents of the damages in which defendant would have to respond to plaintiff in case of breach.

Was it the intention of the parties at the time of entering upon this contract that they should then estimate in advance the actual loss accruing to plaintiff in case of breach?

Our Supreme Court, in *Doan v. Rogan*, 79 Ohio St., 372, held:

“Whether a stipulation providing for liquidated damages for the breach of a contract is to be construed as liquidated damages or as a penalty depends upon the intention of the parties to be gathered from the entire instrument. While courts will not construe contracts in a way authorizing recovery for liquidated damages simply because the parties have used that term in the agreement, yet where parties to a contract otherwise valid have in terms provided that the damages of the injured party by a breach on the part of the other of some particular stipulation, or for a total breach, shall be a certain sum specified as liquidated damages, and it is apparent that damages from such breach would be uncertain as to amount and difficult of proof, and the contract taken as a whole is not so manifestly unreasonable and disproportionate as to justify the conclusion that it does not truly express the intention of the parties, but is consistent with the conclusion that it was their intention that damages in the amount stated should follow such breach, courts should give effect to the will of the parties as so expressed and enforce that part of the agreement the same as any other.”

It is true that a provision in a contract for the payment of a fixed sum for its breach, whether as a penalty or liquidated damages, will not be enforced where it appears no damage has been sustained. See 197 Fed., 661.

The Supreme Court of Alabama, in the case of *Keeble v. Keeble*, 85 Ala., 552, has laid down some admirable rules in construing a stipulation in a written contract for the payment of a specified sum of money on a contingency, with a view to determine whether it is to be regarded as liquidated damages or as a penalty.

“1. The court will always seek to ascertain the true and real intention of the contracting parties, giving due weight to the language or words used in the contract, but not always being absolutely controlled by them, when the enforcement of such contract operates with unconscionable hardship, or otherwise works an injustice.”

It may be contended by the defendant in the case at bar that strict enforcement of the terms of this contract would be en-

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tirely out of proportion to the actual loss sustained, but the court in the Keeble case, paragraph 8, states the law as follows:

“Whether the sum agreed to be paid is out of proportion to the actual damages which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry, if the intent is otherwise made clear that liquidated damages, and not a penalty, is in contemplation.”

The court in the Keeble case states specifically that the law will not enter upon an investigation as to the quantum of damages in such cases, as this is the very matter that was settled by agreement between the parties themselves, and if the act agreed not to be done is one from which damages incapable of ascertainment except by conjecture, are liable to follow, sometimes more and sometimes less, according to peculiar circumstances, the court will not stop to investigate the extent of the grievance complained of as a total breach, but will accept the method agreed upon as the basis of a proper and just measurement by way of liquidated damages, and this is true unless the real intention of the parties under the rules laid down by our courts design it as a penalty.

It was easy to ascertain the difference in the market value of wheat on August 2, 1912, and May 1, 1913, while it would be a difficult matter to ascertain the loss that might be sustained by plaintiff in case the flour should be substituted for wheat as the standard in fixing damages.

The question presented to the court in the case at bar is to be determined only by an examination of the contract. It is no doubt the rule that where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and the contract price. *Kingland v. Western Mfg. Co.*, 92 Fed., 486; *Hadley Glass Co. v. Highland Glass Co.*, 143 Fed., 242; *Delker Company v. Hess Spring Axle Co.*, 138 Fed., 638.

But this is only true in cases where there is no stipulated agreement as to the *modus operandi* which must be pursued by the parties in case of breach. One must consider in this connection the undisputed fact that there was as much chance for

the wheat to *increase* in value after the 2d day of August, 1912, as there was for wheat to *decrease* in value; and if it had increased in value the defendant at bar would be entitled to reap the benefit of this increase and there would certainly not have been a breach on his part.

Our circuit court, in the case of *Jacobs v. Shannon Furniture Company*, 13 C.C.(N.S.), 142, laid down the rule as to whether the amount stipulated for is a fair and reasonable measure of contemplated damages or manifestly excessive, as follows:

“This question must be viewed by the court from the standpoint of the parties at the *time of the contract* and *not ex post facto* when the litigation is up for trial. Contracts are always so construed and a stipulation for liquidated damages is no exception.”

The courts will invariably follow this rule, and such an agreement for liquidated damages is conclusive upon the parties in the absence of fraud or mutual mistake, and a *bona fide* stipulation agreed upon between the parties at the time of the entering into of this contract is binding upon both parties whether the wheat has increased or decreased in value, and this court will refuse to consider evidence tending to show that the amount which defendant is liable for if this contract is enforced would be excessive. See *Sun Ptg. Co. v. Moore*, 183 U. S., 642, 672; 64 Ohio St., 361, 367.

To quote from *Blasting Co. v. Stone Co.*, 64 Ohio St., 367:

“The parties themselves best know what their expectations are in regard to the advantages of their undertaking and the damages attendant on its failure; and when they have mutually agreed on the amount of such damages in good faith and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract.”

Our Supreme Court, quoting from *Dwinel v. Brown*, 54 Maine, 468, embodies the following comment:

“It is the province of the court to uphold existing contracts, not to make new ones. It is not for the court to sit in judgment upon the wisdom or folly of the parties in making the contract, when their intention is clearly expressed and there is no fraud

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or illegality. No judges, however eminent, can place themselves in the place or position of the parties when the contract was made, scan the motives and weigh the considerations which influenced them in the transaction, so as to determine what would have been best for them to do, who was least sagacious or who drove the best bargain. * * * The interests of the public are quite as likely to be subserved in maintaining the inviolability of contracts as they are in contriving ways and means to make a contract mean what is not apparent on the face of it to save a party from some conjectural inequity growing out of the supposed inadvertence or improvidence."

Defendant's counsel, in his very able brief, has referred to the Ohio sales act, Section 8444, but the sales act is not applicable to the case at bar, as the parties in this case entered into specific stipulations in case of breach.

It is therefore the opinion of this court that the provisions of the contract entered into between these parties on August 2, 1912, are to be construed as "liquidated damages" and are not to be considered in the light of a penalty. Motion for new trial will be overruled and judgment may be entered for plaintiff company in accord with the above.

INTEREST ON LEGACY WHERE PAYMENT IS DEFERRED.

Common Pleas Court of Seneca County.

MYRA A. EBERSOLE V. DAVID COLE, EXECUTOR.

Decided, September Term, 1912.

Wills—Interest on Pecuniary Legacy Runs—Notwithstanding an Action is Pending to Set the Will Aside.

While the contest of a will, pending its determination, is an impediment to payment of a legacy thereunder, it does not stop the running of interest on the legacy from the date it would otherwise have become payable.

McCauley & Weller, for plaintiff.

Dunn & Cole, contra.

DUNCAN, J.

Some time prior to October 5, 1910, one Louisa McClean departed this life, leaving a will by which the plaintiff, Myra Ebersole, was given a legacy of \$2,000. One of the provisions of said will reads as follows:

“I hereby nominate, constitute and appoint David Cole executor of this my last will and testament, hereby authorizing and empowering him to compromise, adjust, release and discharge in such manner as he may deem proper the debts and claims due me. I do also authorize and empower him in order to pay the bequests herein made by me, to sell, at private sale, or in such manner, upon such terms of credit or otherwise, as he may think proper, all of my real estate, and deeds to purchasers to execute, acknowledge, and deliver, in fee simple.”

Said will was probated on October 5, 1910, and the defendant, David Cole, was duly appointed and qualified as the executor, and gave notice of his appointment.

The plaintiff says that on December 2, 1912, the defendant having the necessary money and property in his possession for the purpose, she demanded of him the said sum of \$2,000, with interest thereon from October 5, 1911, the principal sum of which he offered to pay, but refused to pay the interest and still refuses and sets up here as a defense thereto that the said will was in contest until November 25, 1912, when the case was heard and the will sustained. The question then arises whether this is a good defense to the claim for the interest.

The exact question here presented has not been decided in this state so far as we are advised. It is held in *Gray v. Case School*, 62 Ohio St., 1, that “A general legacy bears interest, at the legal rate, from the end of the first year from the date of the notice of the appointment of the executor, unless it be clearly apparent that the testator did not so intend.” Here, it is contended by the defendant that the testator did not so intend as the will provided: “I do also authorize and empower him in order to pay the bequests herein made by me, to sell at private sale, or in such manner * * * all of my real estate,” etc., thus to defer such payment to such time as he sold the property, and, as he claims, defeat the interest to that time. That there

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was no money on hand, that the property had not been sold or that the will was in contest might be a good defense for the time being. But as to the liability for the interest, this argument is answered by Judge Davis in his opinion in the case, as follows:

“If the general rule which has been stated above still prevails, and there were assets sufficient for the payment of the legacy and applicable thereto, although not collected, it avails nothing to say that the condition of the estate was such that payment of the legacy at that time was impracticable, or that the assets were not then convertible; for that would be equivalent to saying that a man should not pay interest on his debt because he could not pay the principal when it became due. The whole theory of the rule which we have under discussion is, that interest should be allowed from the time when a legacy ought to be paid to the time when it is paid, as a compensation for the delay of payment; and the claim that interest should not be allowed because the executors were not ready to pay the legacy when it ought to have been paid, and when the legatee could have compelled payment, on giving a bond of indemnity, is altogether untenable.”

But directly to the point is the case of *Kent v. Dunn*, 106 Mass., 586. Massachusetts cases are always good authority in such matters, for it is from that state we have borrowed our administrative law, and it is to that state we naturally look for a guide in the interpretation of our own statutes on this subject. It is there held that:

“A pecuniary legacy carries interest from the time it is due by the terms of the will or the rules of law, although the executor has not at that time assets available for the administration of the estate, and is prevented from administering by impediments interposed by the legatee, and although the legatee has made no demand for the legacy.”

Also:

“The time from which interest is to be allowed on the legacy is not postponed by a provision in the will that the legacy shall be paid ‘next after my lawful debts,’ nor by a provision that it shall be paid ‘as soon as the same can be conveniently done from sales and collections of my property without sacrifice.’ ”

While the contest of the will was an impediment to the sale of the property and the payment of the legacies under the will, it only operated to postpone the payment of the legacy but did not stop interest, "for," as Judge Davis says, "that would be equivalent to saying that a man should not pay interest on his debt because he could not pay the principal when it became due." My motion is that this legacy draws interest from October 5, 1911, one year after the notice of the appointment and qualification of the executor, as prayed for in the petition. The demurrer will therefore be sustained. Unless the defendant desires to plead further, judgment will be entered for the plaintiff on the pleadings for the full amount claimed.

THE CRIME OF EMBEZZLEMENT.

Common Pleas Court of Hamilton County.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA V. GEORGE BROEMER, ALSO KNOWN AS GEORGE BROEMER.

Decided, June, 1916.

Criminal Law—What Constitutes the Crime of Embezzlement—Money Converted to Personal Use With an Honest Intention to Return It.

One who purposely and knowingly takes the money of his employer is guilty of embezzlement, notwithstanding he may have fully intended to return it; but where through an honest mistake, or an error in book-keeping, or a misunderstanding of his instructions, an error appears against him in his accounts, the element of embezzlement is not present.

M. G. Heintz, for plaintiff in error.

Ed. H. Williams, contra.

GEOGHEGAN, J.

Error to the municipal court of Cincinnati.

On September 8, 1914, the plaintiff in error commenced an action against the defendant in error to recover the sum of \$59.33, which it alleged that the said defendant in error converted to his own use. Subsequently, on October 6, 1914, the plaintiff in

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error filed an affidavit for the purpose of securing the arrest of the defendant in error, setting forth that the defendant in error was the agent of the plaintiff in error and that the said defendant in error had criminally incurred the obligation for which the suit was brought. The order of arrest was served and a bond was given to secure the release of the defendant in error. After a protracted hearing, the trial court entered up a judgment finding that there was due the plaintiff in error from the defendant in error the sum of \$44.56, for which execution was awarded, and further finding that the plaintiff in error had probable cause for the arrest of the defendant in error, but that the defendant in error did not intend to defraud the plaintiff in error out of the said sum of \$44.56, and the court ordered the discharge of the defendant in error from the arrest. To this latter finding, discharging the defendant in error from arrest, an exception was noted by plaintiff in error, and it is for this alleged error that these proceedings are being prosecuted in this court.

I have made a careful examination of the bill of exceptions and the exhibits attached thereto, and I find that the action of the trial court in discharging the defendant in error from arrest is not manifestly against the weight of the evidence. The evidence in the case is of such a nature that the trial court, upon consideration of the same, might have found either way upon the question as to whether or not the debt sued upon was criminally contracted. The defendant in error was employed by the plaintiff in error as an insurance collector and solicitor. A large part of the collections were upon what is known as industrial policies, there being a number of policy holders, and the collections were made weekly, the premiums being all in small sums of money. The defense made at the trial was largely that the defendant in error did not purposely appropriate any money to his own use, but that if there was any balance found due the plaintiff in error from him it was due to mistakes and errors in the manner of keeping his books and on account of the failure to give him proper instructions.

Counsel for the plaintiff in error insists that upon the facts the court should have found that there was an embezzlement and that

therefore the finding of the court, that the defendant in error did not intend to defraud the plaintiff in error out of the sum found to be due, was erroneous, in that the intent to defraud is not an element of the offense of embezzlement.

The latter proposition is perhaps true, but, nevertheless, it is also true that before one can be found guilty of embezzlement it must be shown that he intended the embezzlement. A man, who is an agent of another for the purpose of collecting money, who purposely and knowingly takes the moneys of his employer, is guilty of embezzlement, notwithstanding that he may honestly intend to return the money. In this sense an intent to defraud is not necessary in order to constitute the offense of embezzlement. But where an agent, through an honest mistake, or through an error in keeping his books, or through a misunderstanding of his instructions, fails to account to his employer for all the moneys rightfully due the employer, he can not be said to be guilty of embezzlement, because the offense of embezzlement, like any other offense, must have present in it the criminal intent, and no conviction for embezzlement can be had unless the criminal intent is present.

An examination of the record herein discloses that the latter situation may have readily been determined by the trial court. Inasmuch as he was present during this protracted hearing, heard the evidence and arguments of counsel, his determination of the true nature of the circumstances should not be disturbed unless it is manifestly against the weight of the evidence.

Therefore, the judgment of the municipal court will be affirmed.

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NATURE OF THE DEFENSE SET UP BY AN ANSWER.

Common Pleas Court of Hamilton County.

CHARLES SCHMALSTIG V. CHARLES P. TAFT.

Decided, April, 1917.

Verdict—When it Should be Set Aside by the Trial Judge—Pleading—Statement of Agency and an Accounting Not an Affirmative Defense—Burden of Proof With Reference to Such Agency.

1. As a general rule the trial court should not set aside a verdict of the jury where the evidence is conflicting and where different minds could come to different conclusions, but where the jury disregard the law as given them by the court and reach conclusions not supported by the undisputed facts of the case, a court should not hesitate to set aside a verdict.
2. In an action for money had and received, an answer setting up the defense of agency and showing an accounting does not plead an affirmative defense. Such an answer merely sets out a statement of the case different from the one plaintiff claims to be the true transaction, and it is error to charge that the burden of proof is upon the defendant to show such agency.

Worthington, Strong & Stettinius and Robert A. Taft, for the motion.

Jacob Shroder, contra.

MAY, J.

Opinion granting motion for new trial.

The plaintiff sued the defendant for \$55,555.55, money had and received by the defendant for plaintiff's use and benefit. Nine jurors returned a verdict for him in the sum of \$58,703. The defendant filed a motion for a new trial on the ground that the verdict is against the weight of the evidence and for error in giving certain special charges asked for by the plaintiff. The facts, as proved at the trial, were substantially as follows:

In 1905 the defendant purchased one thousand shares of the Chicago Base Ball Club at \$105 per share; the plaintiff bought of the defendant one hundred shares at the same price and gave his note for the same, which note was paid within a year. Between 1905 and 1914, the club earned an average annual dividend of

115% or 920% during that period. The plaintiff was the confidential employee of the defendant and had been in his employ and that of his father-in-law, the late David Sinton, for twenty-three years. The defendant had purchased the one thousand shares as agent for his wife, Anna S. Taft. Shortly after the purchase, the defendant also sold to one Murphy, 530 shares of the capital stock, to Captain Chance 100 shares, to Mary Walsh, his secretary, 20 shares, Anna S. Taft retaining the remaining 250 shares. In 1914, Murphy, the president of the club, and owner of 530 shares, seriously involved the welfare of the club by discharging Manager Evers, and in February, 1914, Governor Tener, president of the National League, and other members, met in Cincinnati to settle the controversy. A protracted meeting, lasting all afternoon, was held in Mr. Taft's office, at which Governor Tener, the plaintiff, defendant, Miss Walsh, Mr. Toole of the Boston Base Ball Club, and Mr. Ackerland, who had become the owner of Chance's 100 shares, were present. Mr. Taft was negotiating with Murphy by long distance 'phone for the purchase of 530 shares and finally bought them for \$500,000, paying \$50,000 cash and giving his note for \$450,000 at 5% interest, the 530 shares being pledged as collateral. Murphy was also employed as adviser to the club at a yearly salary of \$10,000 for five years, provided Taft owned the controlling stock during said period, and Taft also authorized Murphy to dispose of 780 shares at \$800 per share and agreed to pay him, as commission, one-half of whatever was realized above that sum, and the other shareholders were given the privilege of selling on the same terms. Between 1914 and 1916, Taft made several unsuccessful attempts to sell the club. Schmalstig knew of these efforts and assisted him in some of them, and prepared certain statements and plans showing the financial results of such prospective sales.

After 1913 the earnings of the club fell off considerably and the formation of the new Federal League with a club in Chicago reduced the dividends to 5% in 1915. In November, 1915, Taft offered to sell to one Weeghman 900 shares of the club, the 530 Murphy shares, 250 Anna S. Taft shares, 100 Schmalstig shares and 20 Mary Walsh shares for \$500,000. Nothing was done at that time. On January 3, 1916, Taft returned to his office from

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the South and according to the plaintiff, the following conversation took place between them:

“Direct Examination of Plaintiff, Rec., 15 *et seq.*:

* * * “I approached him on the subject by asking him. ‘Mr. Taft, what is there about this base ball deal’ * * * and he said ‘Oh yes, on November 3d, I negotiated for the sale of 900 shares for \$500,000.’ And I said to him, ‘Then I would receive \$55,555 for my 100 shares.’ He turned quickly, by saying, ‘No, I won’t, I might divide between Miss Walsh and you,’ meaning me. * * * ‘I might divide \$50,000 between Miss Walsh and yourself,’ meaning me. * * * Says I, ‘I regard my stock as worth \$75,000 * * * and that I expected my one-ninth portion of \$500,000. * * * And I said to him, ‘You say you only want to pay \$50,000 by dividing between Miss Walsh and me.’ And he gave me no answer the second time as he did the first when I told him I expected my whole ninth part of that money, and he didn’t reply to it, he didn’t reply to it the second time when I spoke then and I answered he had my way of thinking that I was entitled to my one-ninth part of that money. I didn’t offer my stock that evening * * * but on the next morning I said I would go into the deal of the sale of the 900 shares for \$500,000, and Mr. Taft said ‘You can depend on me, and I will do the right thing,’ and I assumed it was all right.”

The plaintiff then stated in detail how he delivered his stock to Mr. Taft, what he did in Chicago in closing up the deal, and how he paid his proportion of the amount due the purchaser, and then said:

“I then made a demand of Mr. Taft for this \$55,555, and he turned around to me, ‘I want your resignation.’ Well, I was stunned for the moment, and I says, ‘Mr. Taft you already have my resignation.’ And he says, ‘Is that so?’ And I got up and told him, says I, ‘Now I am going after my money.’ ”

On cross-examination, this version was adhered to. See records, pages 106, 107.

“ ‘You want to divide up the \$50,000 between us, between Miss Walsh and me?’ I wanted to test him to see whether he still had that in mind, of reducing that portion that belonged to me of that one-ninth part, but he did not say anything to that, and I assumed that he was going to do the right thing by me.”

Miss Walsh gives the following version of what took place between Mr. Schmalstig and Mr. Taft. She said they were both angry and she heard Mr. Taft say, "I will give you what I please." On page 13 of her testimony, she says:

"Mr. Schmalstig, Mr. Taft and myself were in Mr. Taft's private office, and he told me to be seated, and Mr. Taft said, 'Now with regard to that stock' and before he had got any further, Mr. Schmalstig said, 'I will give you my stock, Mr. Taft. I will give it to you cheerfully,' and Mr. Taft said, 'That is all I want to know.' He said, 'I think you can trust me to treat you fairly,' and I believe they both shook hands."

She then tells of Mr. Schmalstig's trip to Chicago to close the Weeghman deal, and his return, and of \$13,000 check Mr. Taft gave him and his refusal to accept it.

Miss Cutter testified (Record, page 33):

That Schmalstig and Taft had a very heated argument and that she heard Mr. Taft say to Schmalstig, "I tell you I won't. I will give you what I please." And that during the following week Schmalstig was figuring dividing up \$50,000 at 37%, and that one day he showed her how he would lose \$42,000 by the deal, and when she asked him how he figured that, he said that \$13,000 was 37% of \$50,000 and deducting that from \$55,000 showed a loss of \$42,000, and that he made the remark, "Mr. Taft might as well go down to the bank and take it out of his bank account as to take it that way."

At page 42 of Mr. Taft's testimony, his version of what took place between Mr. Schmalstig and himself is given:

"I told him that I expected Mr. Sinclair here on the 5th to negotiate for the purchase of the Cubs and the price talked of was \$500,000, and that I would want his stock to make up the 90%. 'Well,' said he, 'how much am I to be paid.' I said, 'You will get your ten thirty-sevenths, just as was agreed on before. Mrs. Taft will get twenty-five thirty-sevenths and Miss Walsh two thirty-sevenths after paying the Murphy note. He said that wouldn't suit him. Then he talked, he said he wanted—I don't—I can not quite remember what per cent., it was a per cent. that he had been claiming, amounting to I think \$55,000. 'Well,' I said, 'You will never get that.' Then he went on to talk about the \$47,000 after it was remitted to me, and he wanted to know if I wouldn't divide that up between him and Miss Walsh and I said I would not. * * * The aggregate amount

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I was going to divide among them was \$50,000. The fact is I was going to pay all the interest on the Murphy note and give Mr. Schmalstig \$13,000, which was 10% of the \$50,000, Mrs. Taft would get her twenty-five thirty-sevenths and Miss Walsh get two thirty-sevenths without charging them any interest whatever. * * * The next day I called him in and asked him what he was going to do. 'Why,' he said, he would turn the stock over to me. He was very pleasant, says he would do whatever I wanted. * * * I believe he shook hands on that. We had made it all up. That was the impression I had and I relied upon him; he said I could have the stock.' After Schmalstig's return from Chicago, Mr. Taft offered him the \$13,000 check, and Mr. Taft says he would not take that check, that he wanted \$55,000. 'That is the first time I heard about the \$55,000 when he made that demand.' Says I, 'Mr. Schmalstig, I will take your resignation.' "

The plaintiff contended that when Mr. Taft received his 100 shares and used them to complete the sale to Weeghman that Mr. Taft was, in law, obligated to pay only his one-ninth share of the price, amounting to \$55,555.55. The defendant denied any liability for money had and received and in his answer set forth the whole history of the transaction, contending that in the purchase of the Murphy stock he was acting as the plaintiff's agent and that as such he was entitled on re-sale with the plaintiff's consent, first to reimburse himself for the Murphy purchase, and also that the plaintiff had agreed that he should repay himself for the money advanced for the Murphy stock. The plaintiff in his reply denied both the agency and any agreement for reimbursement.

Upon the foregoing state of facts and the pleadings, is the verdict for the plaintiff against the weight of the evidence?

In order to answer this question, I have carefully read the transcript of the evidence furnished me by both counsel, and in this opinion I have quoted at length from the evidence of the plaintiff and of the defendant. Placing the broadest construction possible upon the plaintiff's evidence and dismissing for the present all the evidence offered by the defendant, there is no doubt whatsoever that Mr. Taft positively refused to accept Mr. Schmalstigs stock with the understanding that he was to pay him one-ninth of the purchase price. Throughout his testimony

the plaintiff says he assumed that Mr. Taft would do the right thing.

“I did not offer my stock that evening * * * but on the next morning I said I would go into the deal of the sale of the 900 shares for \$500,000 and Mr. Taft said, ‘You can depend on me, and I will do the right thing,’ and I assumed it was all right.”

And this conviction is strengthened by the reading of the evidence of Miss Walsh and Mr. Taft. According to Miss Walsh, Mr. Schmalstig said:

“‘I will give you my stock, Mr. Taft, I will give it to you cheerfully,’ and Mr. Taft said, ‘That is all I want to know. I think you can trust me to treat you fairly.’”

Mr. Taft testified:

“The next day I called him in and asked him what he wished to do. ‘Why,’ he said, he would turn the stock over to me. He was very pleasant; says he would do whatever I wanted.”

But it is earnestly contended by counsel for the plaintiff that the finding of the jury should not be disturbed merely because the court might differ with them. As a general rule, the trial court should not set aside a verdict of the jury where the evidence is conflicting and where different minds could come to different conclusions, but in cases where the jury disregard the law as given them by the court and reach conclusions not substantiated by the undisputed facts of the case, a court should not hesitate to set aside a verdict. That duty, disagreeable as it is, becomes the less so in the instant case for the reason that three members of the jury refused to sign the verdict. In the general charge the court instructed the jury:

“If Mr. Schmalstig told Mr. Taft that if he disposed of that one hundred shares of stock, he would look to Mr. Taft for one-ninth of the proceeds, or fifty-five thousand five hundred and fifty-five dollars and fifty-five cents, and nothing else was said about the matter, and Mr. Taft took that stock, then Mr. Taft would be liable if Mr. Schmalstig told him * * * for that amount.

“If, however, Mr. Taft distinctly refused to accept that one hundred shares of stock upon the assumption of one-ninth of the

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liability to the plaintiff, for that one hundred shares of stock, then, if that was the understanding between the parties, at that time, and if upon the next day Mr. Schmalstig handed Mr. Taft this one hundred shares of stock, after Mr. Taft had said to Mr. Schmalstig, 'I will not do that, I will do something else;' or if he said to Mr. Schmalstig, 'I will pay you only your proportionate share of this amount,' or 'I will pay you a proportionate share of the fifty thousand dollars, which has been received in dividends'—then, when Mr. Schmalstig, on the next day, delivered this one hundred shares of stock to Mr. Taft, if nothing else took place between the parties, then Mr. Taft would only be liable for that proportionate share of the amount in accordance with the agreement."

If, therefore, the jury disbelieved the witnesses for the defendants, nevertheless, under the above charge of the court, giving the broadest construction, as I have already said, to the plaintiff's testimony alone, the verdict is contrary to the law as laid down by the court and for that reason should be set aside.

I am also of the opinion that there was a prejudicial error in the giving of the first special instruction requested by the plaintiff, regarding the burden of proof on the question of agency. That instruction reads:

"The jury is instructed that the defendant must show by the burden of proof by a preponderance or weight of the evidence that he bought from Murphy five hundred and thirty shares as agent for the plaintiff, to the extent of the plaintiff's proportion as claimed by the defendant."

It is well settled in this state that a wrong instruction as to burden of proof is reversible error. In *McNutt v. Kauffman*, 26 O. S., page 127, which was an action where the plaintiff sued for money had and received, the defendant answered, admitting that they had received from the plaintiff the sum sought to be recovered, but said that this sum was paid to them in advance upon a contract, which contract they were willing to perform according to its terms, but which they said the plaintiff had broken. The plaintiff, by reply, denied the allegations contained in the answer, and on the trial, the court instructed the jury that the burden of proof was upon the defendant to prove

that the plaintiff had committed a breach of the contract. This was held error.

To the same effect are the rulings of the Supreme Court in the case of *List & Son v. Chase*, 80 O. S., p. 42.

In that case the Supreme Court laid down the rule that where a plaintiff sets forth in his petition a contract with the defendant, and avers that he has performed all of the conditions on his part, and the defendant for answer denies the allegations of the petition and alleges a contract differing in material conditions from that alleged by the plaintiff, the burden remains with the plaintiff to prove the contract and his performance as alleged in his petition; and it is error for the court to charge the jury that as to the claim made in the defendant's answer the burden is on the defendant, and that the contract as alleged in the answer and denied in the reply must be made by a preponderance of the evidence. See also, *Newman Mfg. Co. v. Fisler*, 81 O. S., 499.

The plaintiff contends, however, that the cases cited by the defendant are cases of express contract, while the case at bar is for money had and received, and cites to support this contention the case of *Sanns v. Neal*, 52 O. S., 56.

That was an action on a quantum meruit for work and labor performed. The defendant filed his answer in which he set up a general denial, and as a second defense he said that the services rendered by the plaintiff were performed by virtue of special contracts; that the wages and compensation under the special contracts amounted to \$3,101.33 and that these were the services referred to by the plaintiff in his petition; that during the employment and service, the defendants paid to the plaintiff the sum of \$3,194.40. The defendants further say that they overpaid the plaintiff, and that therefore there was nothing due him on account of the pretended services. The trial judge instructed the jury that the burden of proof was upon the defendants to show that the services set out in the petition were rendered under a special contract as to the price to be paid therefor.

The Supreme Court held that this charge was correct, and in its opinion stated that the general denial of the defendants

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puts in issue every fact necessary to establish in the plaintiff a right of recovery for any sum whatever. But that as the evidence was not disputed that the plaintiff was in the employ of the defendants for the period that he claimed,

“The great controversy, aside from the statute of limitations, is as to whether the services were rendered under an implied contract, by which the plaintiff is entitled to recover its reasonable value, or on an express agreement as a certain sum per month, as alleged in the answer. Now, as the service is by the evidence of the defendants substantially admitted, so far as the time is concerned, before the defendants can limit the amount of recovery by the special agreement alleged, its existence must be established by a preponderance of the evidence. As to that, the burden of proof is upon the defendants.”

This case was distinguished by the Supreme Court in the case of *Dykeman v. Johnson*, 83 O. S., 126, p. 135.

The Dykeman case was an action upon an account. The defendant in his answer, in addition to pleading the general denial, alleged that the services performed by the plaintiff were rendered and performed by him under an express contract the terms of which precluded the recovery of compensation therefor, and the court held that such averments did not constitute an affirmative defense of new matter requiring a reply, and that the filing of a reply thereto does not operate to change or enlarge the issues, or to shift the burden of proof. That the legal effect of such an answer, taken as a whole, is merely to deny the cause of action asserted by the plaintiff in his petition, and that the burden of proof upon the issues thus joined rested with the plaintiff, and that the trial court correctly charged the jury to that effect.

In speaking of the case of *Sanns v. Neal*, 52 O. S., 56, the court said:

“While certain of the language found in the majority opinion in that case is seemingly perhaps, at first glance, opposed to the conclusion reached by us in this case, yet, when the facts of that case are fully considered, we very much doubt if the court thereby intended to decide anything which we are called upon to overrule or reverse in the present case. In that case, which was also an action on account for services rendered, the

defendants in their answer, after pleading the general denial, by way of further and particular defense alleged that all of the services performed by plaintiff were performed by him under a special contract, and that full payment therefor according to the terms of said contract had been made to the plaintiff, and, while the rendition of the services sued for was put in issue by the general denial, performance of such services by the plaintiff and that he was entitled to compensation therefor was not in dispute, but on the trial was admitted by the evidence of defendants themselves. The performance of the services being admitted, this averment of special contract and plea of payment under and pursuant thereto was more than a mere denial; it was in legal effect the assertion of an affirmative defense, the burden of maintaining which was on the defendants. These facts we think so far differentiate and distinguish that case from the case at bar as to leave it without controlling effect in the determination of the present case."

This statement of the Supreme Court in the Dykeman case readily distinguishes the *Sanns v. Neal* case from the case at bar. The defense of agency was not an affirmative defense. It was merely setting out an agreement different from the agreement that the plaintiff claimed was the true statement of the transaction between the parties. It is elementary that if a defense is an affirmative defense that the defendant has the burden of proving such a defense, but a careful reading of the answer shows conclusively that it merely was a specific denial of the claim of the plaintiff. This view is strengthened by the fact that upon the filing of the answer the plaintiff filed his motion to strike out all the allegations showing the relationship between the parties on the ground that it was pleading evidence.

I do not think that there was any error prejudicial to the defendant in the giving of the other special charges to which exception was taken. For the above reasons that the verdict is manifestly against the weight of the evidence and for the error in the giving of the special charge regarding the burden of proof on the question of agency, the verdict of the jury must be set aside and a new trial granted.

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Baker v. Slusser.

**ELECTION EXPENSES OF PROBATE JUDGE UNDER THE
CORRUPT PRACTICES ACT.**

Common Pleas Court of Summit County.

JAMES J. BAKER v. LEWIS D. SLUSSER.

Decided, 1917.

Elections—What Constitutes the Limit of Expenditure Which May be Made by a Candidate for Probate Judge—Forfeiture of Office for Violation of this Act Can be Decried Only Upon Conviction of the Offense Charged.

1. Under the section of the corrupt practices act which limits the amount which may be expended by candidates at an approaching election, the office of probate judge falls within the provision which fixes such expenditure at a sum not exceeding \$500 with \$5 additional for each one hundred votes in excess of 5,000 cast at the last preceding state election.
2. The court of common pleas is without power to declare forfeiture of an office for violation of this act until the accused has been convicted in due form as provided by statute.

McCLURE, J.

Lewis D. Slusser was a candidate for and secured the nomination by the Republicans of Summit county for the office of probate judge of said county at the primary election held therein on August 8, 1916. On August 17, 1916, he filed with the clerk of the board of deputy state supervisors of elections of said county his expense account, verified under oath as required by the statute, showing his expenditures in said election to have been the sum of \$746.47. By virtue of said nomination his name was placed upon the judicial ticket for the office of probate judge to be voted for at the general election held November 7, 1916, and as a result of said election he received 11,672 votes out of a total vote cast for probate judge of 25,645, giving him a plurality of 4,784 votes over his nearest competitor.

On November 17, and within the period provided by law, he filed with the board of deputy state supervisors of elections of his county his verified statement of expenses of said election showing the amount to be \$251.09.

Thereupon there was issued to him a certificate of election and he was by said board of deputy state supervisors of elections declared to be the duly elected probate judge of said county.

From this declaration of the board, the contestor, James J. Baker, who is a resident and an elector of said county voting at said election, brings this proceeding in this court, under favor of Sections 5148-5153, G. C., on appeal from the declaration of said board of deputy state supervisors of elections, alleging that the several amounts expended by said Lewis D. Slusser are in excess of the amount allowed by law to be expended for the purpose of promoting and securing his election as probate judge as prescribed in Sections 5175-29, G. C.

The proper notice of said appeal and of the taking of depositions in support of the same were served upon the contestee, said depositions were afterwards taken in pursuance of said notice and the matter also came on further to be heard upon oral testimony before this court.

It is the contention on behalf of the contestor that there has been a violation of the so-called "corrupt practice act" (Sections 5175-1 to 5175-29a-29b, G. C.) whereby the election of the contestee should be declared void in this, that he has exceeded in amount the limit of expenditure as prescribed in said act. The sections to which attention is particularly directed are Sections 5175-16 to 5175-29, 5175-29a and 5175-29b, G. C.

The contestee upon his part claims, first, that under a proper construction and interpretation of Section 5175-29, G. C., which is the provision relating to the amount of expenditures by persons seeking public office, there has been no violation of the provisions of said statute as alleged by the contestor. Secondly, if there has been a violation of the provisions of said statute, as alleged, this court is without authority in this proceeding to declare the election of contestee void, for the reason that an accusation involving the criminal charge of a corrupt practice under Section 5175-29, G. C., must be dealt with according to the rules of procedure applicable to like offenses and the guilt if any determined and penalty inflicted as provided in Section 13323-1, G. C.

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Section 5175-29, G. C., undertakes to limit the amount which may be expended by candidates for elective offices in the state ranging from governor down through the various grades (of public office) and after specifying state offices, representatives in Congress and presidential electors, judge of the court of appeals, and state senators, names the judge of common pleas, probate or insolvency court, fixing the limit of their expenditure at \$500. Following this is the state representative with a limit of \$350 and then occurs this language:

“By a candidate for any other public office to be voted for by qualified electors of a county, city, town or village or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election be in excess of five thousand the sum of five dollars for each one hundred in excess of such number may be added to the amounts above specified. Any candidate for a public office who shall expend for other purposes above mentioned an amount in excess of the amounts herein specified shall be guilty of a corrupt practice.”

The claim of the contestor is that a classification is affected by this provision which separates state officers from county officers and that the office of probate judge being a state office the final provisions of the section allowing an increase of five dollars in expenditures per hundred in counties where the vote for governor at the last preceding state election was in excess of five thousand can not apply to the office of probate judge unless it be also held to be applicable to other state officers which leads to exaggerated results as to governor and other state offices which were clearly not in the contemplation of the Legislature.

The effort of the court in arriving at a construction to be given to a statute should be to arrive at such a construction as will be consistent with the intent to be derived from the language used giving effect to all provisions and securing a harmonious result which shall satisfy the requirement as to reasonableness, uniformity and impartiality demanded by the Constitution of the state.

Having this in mind and having also in mind the object sought to be attained by this statute the court is of the opinion

that irrespective of the question whether or not the office of probate judge is a state office, the Legislature was dealing with the office in the relation it sustains to the electorate which is, of course, confined to the county unit and that the provisions by which it was designed to afford additional amounts of expenditures to other county and municipal officers applies as well to the office of probate judge.

It is to be noted that the provisions of Sections 5149, *et seq.*, relating to contests and which is invoked by the contestor in this action classified the office of probate judge for the purpose of said statute as a county office.

The amount which would therefore be available for the expenditure of a candidate for probate judge of Summit county in the year 1916 would be the sum of five hundred dollars plus the sum of five dollars per hundred for all excess above five thousand in the votes cast at the last preceding state election, or approximately \$1,674. The total amount shown to have been expended by Lewis D. Slusser in securing his nomination and election being conceded to be \$997.56, is less than the above sum and is consequently within the lawful limitation fixed by said statutes under the construction given it by this court.

A more important and vital question is presented by the second objection of the contestee which goes to the jurisdiction of this court to declare a forfeiture of office in this proceeding, which is, of course, its sole object. It is said that this is a proceeding to try the title to an office and not one seeking a forfeiture, but while the question is not without difficulty it is plain that the thing sought to be accomplished is to deprive the contestee of the office to which he would otherwise be entitled by reason of his alleged violation of a statute defining a corrupt practice without having first established his guilt by the ordinary methods of prosecution and conviction applicable to like offenses and in accordance with the provisions of Section 13323-1, G. C., which reads as follows:

“Any person convicted of a corrupt practice under this act shall be fined not less than one hundred dollars and not more than five hundred dollars and imprisoned in the county jail

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not to exceed six months, or both; and if he shall have been elected to office, he shall, in addition thereto, forfeit such office."

"The rule is certain," said Lord Mansfield, "that where a statute creates a new offense by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method must be pursued and no other." *Lewis Southerland Stat. Constr.* (2d Ed.), Section 491, page 917.

It was said in the case of *Thompson v. Redington*, 92 Ohio St., 101:

"That elections belong to the political branch of the government and that any authority conferred by the General Assembly of Ohio under Article II, Section 21 of the Constitution, to try contested elections is not judicial power within the meaning of Article IV, Section 1 of the Constitution, which vests the judicial power of the state in the courts, is no longer an open question in Ohio."

And again at page 109:

"The General Assembly has the authority under Article II, Section 21, to determine by law before what authority and in what manner the trial of contested elections shall be conducted and that the mode and methods provided by the statute for such contest are exclusive."

This doctrine was announced in the early case of *State v. Marlow*, 15 Ohio St., 154, and has since been recognized, notably in *State v. Ganson*, 58 Ohio St., 317.

The case of *Prentiss v. Dittmer*, 93 Ohio St., 314, is urged as authority for the position of the contestor herein, but in that case the provisions of Section 5175-26, G. C., provided by its very terms that the commission of any of the acts prohibited should operate as a forfeiture of the office.

In the case at bar there is no such provision attached to Section 5175-29, G. C., and hence, as the court is without power to exercise its judicial functions but must act solely in its quasi-judicial capacity, it can not act otherwise than as in such stat-

utes it is provided, which results in this: that no forfeiture of office can be decreed until and except in accordance with the provisions of Section 13323-1, G. C., it has been ascertained that the offense which is alleged has been in fact committed. This view is further supported by *State v. Ganson, supra*.

It was said in the case of *State v. Belknap, supra*:

“That the choice of the electors as expressed by their ballots should not be tainted with fraud and corruption is of the utmost importance to the electors and to the state, and such laws as the one we are now considering, enacted for the purpose of enforcing the purity of the ballot, are wise and should be rigidly enforced; but it is of equal importance, both to the electors and to the person elected, that the person rightfully elected by the people should be permitted to perform the duties of the office when he has been legally elected.

“The Legislature, in enacting the provisions under consideration, wisely provided a speedy and efficient means of determining the right of a person elected to an office who may be charged with improper conduct in securing his election. It will not do to brush aside the proceedings provided by this act for a forfeiture of the office as mere technicalities not controlling on the courts and proceed as a court of equity to deprive the party elected by the electors of his office. *State v. Deputy State Supervisors*, 20 C.C.(N.S.), 190; 3 Ohio App. Rep., 190, 201.”

The court has reached the conclusion that, sitting as a tribunal of *quasi*-judicial functions clothed with the powers only which are conferred by the Constitution and laws relative to election contests, that in the absence of power expressly conferred by the Legislature to decree a forfeiture of office for the violation of the provisions of Section 5175-29, G. C., that the only method by which this can be accomplished is by resort to the provisions of Section 13323-1, G. C., and that this action must be taken antecedent to the appeal in an election contest.

The appeal of the contestor will therefore be dismissed at his costs.

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Bell v. Pollak Steel Co.

AS TO INJURY TO RESIDENCE PROPERTY FROM SMOKE AND VIBRATION FROM A STEEL PLANT.

Common Pleas Court of Hamilton County.

ROSE BELL ET AL V. POLLAK STEEL COMPANY.*

Decided, August, 1916.

Injunction—Does Not Lie Against Operation of Heavy Machinery in a Steel Plant, When—Complaint by Owners of Residence Property—Railway Shown to Have Caused More Vibration Than the Steel Plant—Rights of Manufacturers Located in a Factory District as Against Near-by Residents.

Injunction does not lie against the operation of a factory on the ground of injury to residence property from smoke and vibration of the earth, where it appears that the factory is located in a factory district, and is separated from the property in question by a stream of water and a railway operating sixty-four trains a day, and the trains cause more smoke and vibration than does the operation of the factory, and that the parties complaining acquired their property with one exception, some time after the factory began to operate.

Schmuck & Jacobs, for plaintiffs.

Stricker & Johnson, contra.

CALDWELL, J.

This is an application for an injunction. The court finds that said defendant's plant is located in a manufacturing district on some twenty acres of ground west of the C., H. & D. Railroad tracks and also west of Millcreek and directly west of Carthage; that the C., H. & D. Railroad and Millcreek separates it from the residential part of Carthage; that the defendant's plant is connected with the C., H. & D. by switch, and located where it is naturally to be presumed factories will locate in the progress and growth of our city; that the C., H. & D. Railroad Company runs an average of sixty-four trains a day; that the plaintiffs' property is immediately across the street eastwardly from the C., H. & D. tracks; that said defendant's business is a lawful and useful business; that they are engaged in the manufac-

*Dismissed in the Court of Appeals on statement of counsel.

ture of all kinds of round and square bars, locomotive driving axles, car axles, tender, truck and trailing shafts, and there is some evidence that they are now engaged in connection with their other business in the manufacture of rough forgings for shells; that said plant located there some eighteen years ago. At that time the only one of the complainants that owned property was Mrs. Bell. It is in evidence that two or three of the plaintiffs lived in the houses they now own some little time before they purchased them, and therefore were familiar with the workings of defendant's plant.

While it is claimed by plaintiffs that the noise and vibration has been greater in the eight months preceding the filing of the petition, there is evidence tending to show that there was more noise before this time, and much more smoke than at the present time. It is in evidence that plaintiff, Berner, worked for the defendant company some seventeen years, and that he was discharged on the 9th day of May, 1916, and on the 10th day of May, 1916, Berner, with others of the plaintiffs threatened the defendant company through counsel to enjoin the operation of their plant, but suggested this might be avoided by the purchase of their property, and thereupon gave prices at which the same could be purchased. It appears in evidence also that Berner, when he was discharged, stated it was his duty to get legal advice as to an injunction, as he stated, so they could sleep.

The court has made several trips to the neighborhood and one to the plant. The observation of the court is that the smoke from this plant, while it might be lessened, does not affect the property of plaintiffs anything like as much as does the smoke and cinders from the trains passing over the C., H. & D. tracks, and the smoke from the factory immediately north of said property. The houses of the plaintiffs do vibrate more or less from the operation of this plant, but from the court's observation and from the testimony they are not in excess nor equal to the vibration caused by the passing of trains over the C., H. & D. Railroad. There are some cracks in the houses of the plaintiffs, according to the testimony and the observation of the court, and there is testimony to the effect that some of the cement work of the houses has been cracked, and it is claimed from the vibration coming from this plant.

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The rule governing these cases, as the court understands it, is:

“To authorize an injunction it must be such a noise as produces actual physical discomfort in persons of ordinary sensibility, and it must be noise unnecessarily made.”

Therefore, under the ruling of the court of appeals in the case of *Henry F. Gau et al v. Howard M. Ley et al*, 27 C.C. (N.S.), 1, and considering the general rule in this state as announced in *Goodal v. Crofton*, 33 O. S., 271, the court is unable to grant the relief prayed for in plaintiffs' petition, and an entry may be made accordingly.

INJUNCTIVE RELIEF AGAINST VIBRATIONS.

Superior Court of Cincinnati.

ROSE BELL ET AL V. POLLAK STEEL COMPANY.

Decided, March Term, 1917.

Injunction—Does Not Lie Against a Manufacturing Plant on Account of Vibration, When—Degree of Proof Required—Res Adjudicata.

1. Injunction will not lie against the operation of a steel manufacturing plant on the ground of injury to residence property from vibration, where it appears that the plant is located in a manufacturing and railroad district and is separated from the residences in question by a stream of water and a railway system operating sixty or more trains per day, said trains causing as much and at times more vibration than said steel manufacturing plant operation.
2. The doctrine of *res adjudicata* applies in cases where injunctive relief is sought against “vibrations” suffered by owners of property, unless the vibrations are greater than those complained of in former litigation involving the same issues and between the same parties.
3. Injunctive relief will not be granted unless the proof is clear and convincing, tending to show irreparable damage for which no adequate relief can be had at law.

Schmuck & Jacobs, for plaintiffs.

Stricker & Johnson, contra.

GUSWEILER, J.

The plaintiffs own their own homes and all reside on Rosewood avenue, Cincinnati, some 400 feet east of the defendant company's manufacturing plant. The C., H. & D. Railway tracks parallel plaintiffs' property within a very few feet, upon which said railway company is operating daily some sixty or more trains. Millcreek and the said railway tracks lie between plaintiffs' property and defendant company's plant.

The complaint of plaintiffs in this action is that in the operation of defendant's steel manufacturing plant it uses certain "helve hammers" and certain "large drop hammers" from the use of which plaintiffs suffer in their sleep, etc., from vibration, which also materially damages plaintiffs' houses, all to their irreparable injury, for which they pray for injunction.

The steel company, by way of defense, among other things, contends that it is doing precisely the same character of work it has done for many years past, using the same hammers and in the same manner; that plaintiff, on June 19, 1916, filed a suit in the Court of Common Pleas of Hamilton County, in which the same injunctive relief was sought as prayed for in the instant case; that the trial court after full hearing in said action declined to issue an injunction, *ante*, which finding and order was affirmed by the court of appeals on November 23, 1916; that on the same day the defendant company paid to the plaintiffs a substantial sum of money, for which the defendant received a general release in said cause of action. After so releasing the defendant company, to-wit, December 29, 1916, the plaintiffs filed the present suit, setting up the identical complaint set out in the former suit. The defendant company contends that all this is *res adjudicata*, unless plaintiffs can show greater vibrations and different conditions, operations and results from the conduct of defendant company's plant than existed on November 23, 1916; that is, that the trial court and court of appeals having finally determined that no nuisance condition or plant operation condition warranted injunction at that time, that no such injunctive order can follow now if everything as to operation and conduct at present is the same. Further, the defendant steel company denies that it is wrongfully conducting its

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business and plant operation to the irreparable damage of plaintiffs.

By reply the plaintiffs contend that the point of *res adjudicata* raised by defendant company is without merit as to vibration occurring subsequent to said court finding and mutual settlement, and also allege that the vibrations are greater since said date than prior thereto.

The court has listened to many witnesses and has heard much evidence on the points in controversy, and has visited the plant of defendant steel company in operation as well as the plaintiffs' premises. Plaintiffs' premises were visited by the court during the trial in January and also February 22, 1916, and March 20, 1916, with and without counsel present. Whether the court approves or disagrees with the contention on the theory of *res adjudicata* applying in this case, it is settled law that the chancellor must be convinced by clear and convincing proof that there is no adequate remedy at law and that the case justifies injunctive relief before plaintiffs can prevail (33 O. S., 371). Is this a case under all the circumstances where, by such proof, irreparable damage is being done to plaintiffs? Damages to the premises of plaintiffs, if ascertainable in money damages, can be recovered in an action at law, but can not be relieved against in equity (5 N. P., 203). We are of the opinion that in this case irreparable damage and injury must flow and be inflicted upon plaintiffs, aside from property damages, for which they have no adequate relief at law.

After careful consideration and investigation we are of the opinion that the property of plaintiffs is being vibrated by defendant company's plant in a perceptible manner; the chandeliers, gas fixtures, looking glass, bed, windows, etc., are affected. We also notice this condition when the railway trains pass, at times indicating a greater degree of vibration than from defendant's plant. But is the condition and effect such as to be irreparable in damage under all the circumstances in this case, having in mind the character and location of the premises, etc., and without considering the question of *res adjudicata*?

Here we have a case where from the evidence it is proven that the defendant company has been engaged in the Millcreek val-

ley, a part of Cincinnati, for the past twenty years, in the operation of a forge and shape shop in the manufacture of locomotive driving axles hammered from billets and ingots, car axles, tender, truck and trailing shafts and heavy steel products, etc., with large invested capital, employing nearly 1,500 men, at an annual wage of nearly one million and one-half dollars, the plant covering an area of some twenty acres, extending one mile east and west, and being one of Cincinnati's largest manufacturing industries, and that the said business is conducted in a modern, up-to-date manner. On the other hand, we find that the operation of said plant does actually vibrate plaintiffs' premises. In determining the rights of plaintiffs and defendant company we are bound to consider these various situations. Simply because defendant represents one of Cincinnati's greatest manufacturing industries will not of itself conclude plaintiffs in their rights. In order to determine their legal rights and the violation thereof, we must consider the location of plaintiffs' premises in the Millcreek valley in a manufacturing, factory district, surrounded by many other manufacturing plants and concerns, and that plaintiffs' houses are located within a few feet of the C., H. & D. Railway tracks where sixty or more trains are operated daily. All these matters are proper for the chancellor to consider in order to determine by clear and convincing proof whether plaintiffs have suffered and are suffering irreparable damages (Wood on Nuisances, 638-39; 5 N. P., 359).

We are satisfied that plaintiffs' premises are located in what is known in law as a manufacturing and railway district. There is no evidence indicating that defendant company's plant is being operated in an improper manner or can be operated under different or more modern methods by which the vibration complained of could be obviated.

The court has held (7 N. P., 254) that the deprivation which plaintiffs suffer of natural rest at night is an interference with their rights for which they are entitled to a remedy; the same principle being also found in 8 N. P., 398; 19 N. P., 70. While it has been held (13 C.C.[N.S.], 335) that heavy hammers and machinery operated in a manufacturing district can not be enjoined where no substantial vibration is produced, nevertheless

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we are not ready to say that because defendant's plant is located in a manufacturing district defendant is at liberty, without limitation, unreasonably and substantially to vibrate plaintiffs' premises. Even though plaintiffs' premises are located in a factory or manufacturing district they have legal rights which a court of equity will protect. But plaintiffs, under the present state of circumstances, in law are bound to submit to certain handicaps to their property rights by virtue of such location, which they would not if they were located in a residential district (15 C. C., 228). Persons dwelling in the vicinity of shops, factories, etc., can not in law have the same quiet and freedom from annoyance that they would have in different or other districts (68 O. S., 51; 1 Ch., 234 [1906]; 15 N.P.[N.S.], 1). In that case the court of appeals refused an injunction.

We find also from the testimony in the case at bar that in the operation of the numerous trains over the C., H. & D. tracks in this vicinity much vibration is caused, and at times very perceptible and great, so much so, that while the Union Gas & Electric Company was recently placing its utility conveniences in the trench on Carthage pike, which is parallel on the east and perhaps twice as far from defendant company's plant as plaintiffs' premises, the soil on the edge of the trench at the surface level was shaken back into the trench when the trains passed by, which did not occur while defendant's plant was in operation when the trains were not passing. The character and volume of defendant's business must be considered. It is a legitimate business and must, of course, be located along the line of a railroad for freight shipping and in the vicinity where its 1,500 or more employees live. The only place where such a business can be successfully and perhaps properly conducted is away from the most thickly populated districts, in a manufacturing locality, dedicated to the march of trade as conducted in progressive America, located where it is naturally to be presumed factories will locate in the progress and growth of the city, and on the line of a trunk railway, where the numerous and necessary supplies of coal and raw material can be expeditiously and properly handled and the volume of manufactured goods of defendant company can be expeditiously and properly shipped.

Millcreek valley at this point, in our judgment, is a manufacturing district and adapted to great manufacturing industries. Where else or to what other kind of location shall we say that this plant shall go? Can it be said that it shall be removed to the open land, apart and distant from any railway conveniences and convenient homes for its employees?

The case at bar has been skillfully and earnestly tried by the learned counsel on both sides. After careful and serious consideration of the law, in summing up the evidence as given by all the witnesses, considering the observations as to the conditions and effect of the vibration on the premises of the plaintiffs on the three visits made in person by the trial court; when we consider that there are perceptible vibrations affecting plaintiffs' premises due to the operation of defendant company's plant, as well as from the railway trains passing; when we consider the location of plaintiffs' premises within a very few feet of the C., H. & D. Railway; that this railroad and Millcreek lie between plaintiffs' premises and defendant's plant; and considering the extent of the acreage, territory, the character and volume of defendant's business, the number of employees it carries on its pay-roll and all other points so ably presented by counsel, and the evidence in this case, we have come to the following conclusions, to-wit:

1. That plaintiffs' premises are located and situated in a manufacturing, railroad, business district.

2. That the doctrine of *res adjudicata* applies in the case at bar.

3. That we are not convinced by clear and convincing proof that greater vibrations have occurred since November 23, 1916, nor do we believe that the fair preponderance of the evidence so proves.

4. That even if the doctrine of *res adjudicata* did not apply, there has not been sufficient proof in the instant case of a clear and convincing nature to establish the conclusion, in the opinion of the court, that irreparable injuries are being sustained by plaintiffs warranting injunctive relief.

5. That under the rulings laid down by the various authorities previously cited and especially under the ruling of our

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court of appeals in the case of *Gau et al v. Ley et al*, 27 C.C. (N.S.), 1; and considering the general rule in Ohio as announced in *Goodal v. Crofton*, 33 O. S., 271, and *Eller v. Koehler*, 68 O. S., 51, the prayer of the petition will be disallowed, the injunction denied, and the petition of the plaintiffs dismissed at their costs.

**CONTRACT TO TURN OVER STOCK OF GOODS TO TRUSTEE
TO PAY DEBTS CONSTRUED AS AN EQUI-
TABLE MORTGAGE.**

Common Pleas Court of Richland County.

FIRST NATIONAL BANK V. O. H. HIBBARD ET AL.

Decided, December 8, 1916.

Debtor and Creditor—Insolvent Merchant Turns Over Stock to Creditor as Trustee to Pay Debts—Money Advanced by Said Creditor for Compromise of Claims—Debtor Subsequently Goes Into Bankruptcy—Nature of the Trustee-Creditor's Claim—Debtor Denied Right to Exemptions.

1. A written agreement between a creditor and an insolvent merchant, who with his wife waived their homestead and other exemptions, by which (1) the creditor advances a certain sum of money to compromise and settle the claims of other creditors, (2) a trustee is appointed to take over the store stock, book accounts and all assets belonging to the business, and (3) conduct the business, (4) convert the stock into money and pay the money advanced, the debt due such creditor, expenses of the trust estate and return the balance to the debtor, is in the nature of an equitable mortgage against the proceeds of which no claim for exemptions will be allowed, and enforceable between the parties in equity.
2. The fact that the debt of creditor is evidenced by promissory notes affords no right under the contract to enforce payment by an action at law either before or after voluntary bankruptcy proceedings instituted by the debtor.
3. The fact that a few minor claims of three creditors had not been settled and paid and in all probability would have been taken care of if debtor had not filed his petition in bankruptcy, can not be permitted to aid debtor in evading the terms of such contract.

Wickham & Martin, for plaintiff.

Long & Marriott, contra.

MANSFIELD, J.

This is an action for an order fixing a lien or right of distribution to certain funds held by the trustee of the bankrupt estate of the defendant, O. E. Hibbard. The petition alleges in substance that the defendants, on September 23, 1915, were indebted to the plaintiff in the sum of \$820 and also to other creditors in the aggregate sum of about \$3,000; that said defendant, O. E. Hibbard, at said time was the owner of a stock of dry goods situated in the village of Greenwich, Huron county, Ohio; that on or about said date the creditors of said Hibbard were pressing him for payment of the obligations due them and that the defendants and plaintiff entered into an agreement in writing whereby it was agreed that the plaintiff should advance the sum of \$750 to be used for the purpose of settling with the creditors of said defendant other than the plaintiff by paying to them 25 per cent. of their respective claims.

It is further provided in said agreement that one Clarence C. Bebout should be the trustee of the respective parties and that the stock of dry goods, book accounts and all assets belonging to said store should be turned over to said Bebout as trustee with full power and authority to conduct said business and to convert into money all of said stock and assets until the indebtedness due to the plaintiff should be fully paid, and that when said indebtedness and said sum of \$750 and the necessary expenses of said trustee should be paid, said trustee should return to said defendants all assets then remaining. It was further agreed in said contract that said O. E. Hibbard and Pearl Hibbard expressly waived all their rights under the law of Ohio of exemptions in lieu of a homestead or otherwise. It is averred in the petition that upon the execution of the contract and its acceptance upon the part of the plaintiff and the acceptance of the trust upon the part of said Bebout said stock of goods and assets provided in said contract were turned over to said Bebout, who entered into possession of the same pursuant to the terms of said contract; that plaintiff advanced the sum of \$750 as provided in said contract and that the same was applied in making settlement upon the basis of 25 per cent. of

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their claims with all the creditors of said O. E. Hibbard scheduled by him to said plaintiff except two or three small creditors, which claims were in process of adjustment at the time of the filing of a petition in bankruptcy by the defendant.

Plaintiff avers that it performed all of the conditions of the terms of said contract upon its part to be performed, that said Bebout, as trustee, took possession of said stock of goods, reduced the same to money, and that the said O. E. Hibbard and Pearl Hibbard became employees of said trustee under the terms of said contract and participated in the selling of goods and their conversion into money as provided by the terms of said contract.

Plaintiff further avers that on January 3, 1916, the defendant, O. E. Hibbard, filed a voluntary petition in bankruptcy and on said date was by said court duly adjudged a bankrupt; that after the adjudication in bankruptcy said trustee had in his hands as the trustee of said stock of goods, after paying to plaintiff the sum of \$750, so as aforesaid advanced under the terms of said contract, the sum of \$745.19, which it was agreed between the parties might be turned over to the trustee in bankruptcy, subject to all the liens and rights both of plaintiff and these defendants; that the defendant, O. E. Hibbard, has filed with the referee in bankruptcy his claim for the sum of \$500 in lieu of a homestead and that out of moneys in the hands of said trustee the referee has ordered that the sum of \$500 be set aside as an exemption to O. E. Hibbard in lieu of a homestead, but reserving to said plaintiff the right to assert its claim against said exempt property in a state court. Plaintiff then avers that the \$820 referred to in the first instance as owing originally by the defendants to the plaintiff are evidenced by four promissory notes, one of \$100, one of \$200, one of \$400 and another one of \$100. That all of said notes are wholly unpaid with interest and each and all are long past due.

Plaintiff avers that said defendants are wholly without right either in law or in equity to claim the sum of \$500 or any sum in lieu of a homestead or otherwise out of said funds still in the hands of said trustee in bankruptcy, and by reason of

said facts are estopped so to do; that by virtue of the premises the plaintiff is entitled to a lien upon said sum of \$500 in the hands of said trustee, set apart as exempt by said referee, for the payment of plaintiff's claim; that by reason of said adjudication of bankruptcy plaintiff can not bring an action against O. E. Hibbard for a money judgment and it is without adequate remedy at law and its only remedy is by appeal to the equity powers of this court; and plaintiff prays for an order or decree subjecting its right in and to said fund to the satisfaction of its claim as against any claim made by said defendants for an exemption by way of a homestead.

Defendants by their answer admit substantially all the material facts set forth in the petition except the allegation that there is but one creditor with whom settlement had not been made, which is denied, and also deny that the trustee at the time of the adjudication in bankruptcy had the sum of \$750, but avers that the stock of goods was sold some time afterward by said Bebout without any order of the court, but admit it was agreed between the parties that the money received by said plaintiff and said Bebout might be turned over to the trustee in bankruptcy subject to the rights of the parties hereto.

There are some other denials in the answer and it may be inferred fairly from the pleadings that they deny the claim or averment in the petition as to the effect or construction which plaintiff puts upon a certain clause of the contract with reference to the waiver of a homestead exemption of the defendants.

The case was tried substantially upon an agreed statement of facts and there is no dispute as to any material fact growing out of the issues presented by the pleadings, so the question becomes one wholly of law for the court to determine from the undisputed facts in the case.

The defendant contends that this court is without jurisdiction to grant the relief prayed for for the reason that before any relief could be granted to the plaintiff, if it is entitled to any relief, that it was first necessary for it to proceed in a court of law prior to the bankruptcy proceedings to secure a judgment against the bankrupt, and cites upon the proposi-

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tion several federal decisions to sustain their contention. Most of these decisions, as the court reviewed the briefs of counsel for defendants, are causes arising under the Constitution and laws of Alabama, and in going over the brief of counsel and the citations therein referred to, the court has no doubt that the same are sound and are applicable to the facts as presented in those cases under the Constitution and laws of Alabama; but I can not see how they have any application to the case at bar. In the first place, the rights of these parties should be determined by the terms of the contract which they have solemnly entered into, if their rights can be clearly determined and ascertained, and the contract is one which is valid between the parties and valid under the law. By this contract each of the parties voluntarily consented to a certain course of action and conduct with reference to their respective rights. The plaintiff bank was to advance the sum of \$750 in order to effect a settlement with the various creditors of the defendant, which settlement if carried out upon the basis stipulated would be of great benefit to the defendant. And the bank, as to its antecedent claim of \$820, was to be postponed until the creditors were taken care of upon the basis named in the contract, and then the bank was to be paid and the balance, after paying the expenses, etc., was to be turned over to the defendants. There was nothing illegal in this arrangement. There were possibilities of mutual advantage to each of the parties to the contract if the same was carried out in good faith. The defendant, on one hand, would be cleared of his indebtedness and a possibility of the bank receiving a part or all of its antecedent debt and a further possibility that after all the debts were cleaned up that the defendants might receive a substantial sum after all the obligations had been settled. The very nature of this contract precluded the plaintiff from bringing an action at law upon its notes of \$820 so that it might secure a judgment at any time during the period the contract was in force. In other words, it practically, by this contract, estopped itself from a proceeding at law to take a judgment upon its notes while the contract was being executed, and to this arrangement the defendants consented; and if the bank had undertaken to enforce by judgment

it would have been unquestionably a breach of the contract upon its part. So that the argument suggested that there was an adequate remedy at law upon those notes prior to the adjudication in bankruptcy after this contract was entered into I do not believe is well taken; and it is well settled that under the bankruptcy law after the adjudication of the defendant, Hibbard, as a bankrupt, no action at law could be maintained by the plaintiff against the defendants on these notes.

So far as a question of jurisdiction is concerned, it is very clear to this court that the only remedy is one in equity.

Now, it appears that the referee in bankruptcy, upon the hearing of the application of the bankrupt and his wife for exemptions under the authority of the federal decisions upon that subject, held that, upon the showing made by the plaintiff, the First National Bank of Greenwich, Ohio, claiming that the exemption of the defendants had been waived by them, it was a matter that should be referred to the state courts for determination, and that an opportunity would be given to the bank to try that question in the state court before the bankrupt should be discharged, and a reasonable time was given for such purpose; and consequently this action was brought, and the whole question is what effect should be given to that stipulation in the contract providing for a waiver of homestead exemption by the defendants, O. E. Hibbard and Pearl Hibbard.

It might be well to review the acts of the parties with reference to this contract as disclosed by the agreed statement of facts and the natural inferences to be drawn therefrom. There is no question but what the parties entered into this contract in absolute good faith and there is no question but that the plaintiff, the First National Bank, substantially performed all the terms and conditions of the contract upon its part to be performed; that if any of the creditors were not settled with, and I believe there were three whose claims were less than the sum of \$100; it was caused by the defendants in filing a voluntary petition in bankruptcy and not from any act or omission upon the part of the plaintiff.

It also clearly appears from the evidence that the defendants proceeded to execute this contract, that they accepted

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employment and received their pay and compensation as employees of the trustee who was placed in charge of the business to do the things provided for under the terms of the contract, and it further appears that the only reason why the contract was not fully executed and its terms carried out specifically was because it was interfered with wholly by the act of the defendant, Hibbard, by going into voluntary bankruptcy. Now, then, what was the effect of this contract in the first instance. It was a transfer or sale, we might say, of all the property of the defendant, the dry goods store in question, to Mr. Bebout as a trustee, and possession was given by the defendants to said trustee in pursuance and to effect the purposes of said transfer or sale. When Bebout took possession of the goods, so far as a transfer was concerned it became an executed contract and the rights of the parties were determined and fixed and the rights of either subsequent thereto were to be determined wholly upon whether or not the trust was executed in accordance with the terms and conditions of the contract. Now, then, the agreed statement of facts clearly indicates that the trustee whom the defendant placed in possession of this property fully and substantially executed this trust. Under its terms the defendants agreed to waive, so far as the First National Bank is concerned, their right to a homestead exemption or otherwise in any of the proceeds arising out of the sale of the property, and that is as between the claim of the First National Bank either of its prior debt or the new debt created in pursuance of the contract created for the purpose of carrying out the terms of the contract.

In my view, this contract between the parties was in the nature of an equitable mortgage; that is, it has all the character and indicia of a mortgage of chattels which would be absolutely good as between the parties even though it would be invalid as against general creditors. It might be said that it was uncertain as to whether or not it would effect a material benefit to the bank on its antecedent claim of \$820 against the defendants. To do that it had to depend upon the results coming from the complete execution of the contract which might be of benefit depending upon the circumstances and success

in handling the business in the sale of the goods under the terms of the contract. During all the period, however, of its execution the defendants were absolutely protected in that they were receiving employment upon a salary agreed as satisfactory to them and their compensation would not depend upon the success of the new undertaking but was simply limited as to them depending upon how long it took to execute the contract. The contract was founded upon a sufficient legal consideration, it having all the character and indicia of a chattel mortgage or of a transfer of property to carry out the purposes of the contracting parties; it was absolutely good as between the parties and the waiver of the homestead exemption contained therein must be held to have the same force and effect as it would in any chattel mortgage or instrument wherein there was a sufficient consideration.

Another thing that appears to the court, and that is, it would be very inequitable to permit the defendants now to take advantage of the bankruptcy act in order to avoid the plain obligations and terms of their contract. It is very evident from the circumstances as disclosed that there existed no reason for the defendants to go into bankruptcy at all, that the three remaining claims that were unsettled were of minor importance and would have been taken care of by the trustee of the parties under the terms of the contract, and that the filing of the petition in bankruptcy by the defendant was done wholly and solely for the purpose of evading the solemn obligation that he had entered into, and of his wife; that as against the claim of the bank and for the consideration therein named they had waived their right of homestead exemption. Therefore, without referring or trying to analyze the various authorities cited by counsel—I have gone over the briefs very carefully, read the cases upon the facts of this case peculiar in themselves but very plain and easy to understand as applied to well known principles of law—I am clearly of the opinion that the plaintiff is entitled to the order prayed for in the petition, and a finding and decree may be had in conformity thereto.

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AS TO THE VALIDITY OF IRREVOCABLE PROXIES.

Common Pleas Court of Franklin County.

ELLA E. CRAIG, GEORGE W. BLANCHARD AND RUTGER BLEEKER
MILLER V. THE BESSIE FURNACE COMPANY.

Decided, May 7, 1917.

*Corporations—Inspectors of Election Will Not be Appointed, When—
Conditions Under Which Irrevocable Proxies Must be Regarded as
Valid.*

1. A court will decline to appoint inspectors of a corporate election, under the provisions of Sections 8640 *et seq.*, where there is reason to believe that by so doing contractual rights may be distributed without a proper legal adjudication.
2. While general doctrine prohibits separation of the voting power from the beneficial interest in corporate stock, still the settled rule is that separation of such power is justified and legal, where there is a property interest of the corporation to be carried out, or some beneficial interest of stockholders to be subserved, or some lawful purpose advantages to stockholders to be effectuated.
3. Where a majority interest in the stock of a corporation unite in a plan for refinancing and a change of management in the belief that the best interest of the company will be promoted thereby, the giving of irrevocable proxies to the new management who are bringing in new capital is accompanied by the creation of an equitable interest in the welfare of the corporation of such a character as to sanction a separation of the voting power from ownership of the stock.

James M. Butler, for plaintiff.

W. O. Henderson, contra.

KINKEAD, J.

This is a proceeding under Sections 8640-8645, providing for applying to the court for the appointment of inspectors to receive and count the votes at a meeting of the subscribers of the stock of the defendant company for the election of directors. The petitioners own more than the ten percent. of the stock as re-

quired by statute conferring the right to resort to this proceeding.

It is alleged that certain stockholders other than plaintiffs entered into an agreement by which the voting power of 1,900 shares of the total present outstanding 2,250 shares of the stock of the company was vested in the Union Trust Company, a banking corporation of Pittsburgh, Pennsylvania.

Irrevocable proxies were given by holders of 1,900 shares of capital stock to the trust company authorizing it to represent the holders of such stock at any regular or special meeting of the stockholders, and to vote the same upon any question pertaining to the management, control and operation of the property, and for the election and re-election from year to year of the directors.

Plaintiff stockholders, it is alleged, did not give assent or approval to the agreement.

The management of the company since such agreement has been in certain persons, the parties to such agreement being residents of Pennsylvania. Complaint is made that these persons have refused to give information to some of the officers and directors concerning the affairs of the company, that complete possession of all the books are in the hands of the non-resident officers and directors, and that such books have been taken outside the state.

Some of the parties to this agreement, who gave proxies, have sold their stock. The proxies given the trust company it is stated have been canceled and revoked, but that the trust company will claim the right to vote the stock by virtue of the proxies, and thus continue the domination and control of the company under the persons named.

The defendant company and George S. Davison, Allen S. Davison and Albert P. Meyer, with whom this voting contract was made and in whom it appears the management and control of the company was to be vested and in whom it has since been and will continue to be if the terms of the contract are to be carried out, file answer herein making denial of charges made by the petitioners. They also set forth with some detail the

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facts and circumstances leading up to the making of the agreement, and the object and purpose thereof.

In short, it is alleged that the company was in financial straits and badly in need of funds with which to meet pressing current demands as well as additional capital to insure its success. The conditions of the contract were that the former management was to be relinquished and the same be transferred to those now in control, and that the Davison Company should continue to be the exclusive selling agent of the company during the five years covered by the contract. It was agreed that those assuming the new management of the company should arrange for advances of necessary funds as well as to secure a large loan as additional capital. The new parties were also to subscribe for \$25,000 of the remaining unissued stock of the company.

The existing unsold bond issue was to be retired and a new mortgage loan for \$100,000 was to be secured. A loan was made by the Union Trust Company for this amount which was guaranteed by Davison, it being apparent that such loan would not have been secured or made but for such contract and proxies. The grounds for asking appointment of inspectors is that the agreement transferring the voting power is void; or if it is not void, that the same may be revoked and the proxy be withdrawn at the pleasure of a holder of the stock.

From certain allegations in the complaint of plaintiffs it is apparent that because some of the stock owned by those who gave the five-year irrevocable proxies has been sold to others, the proxies are thereby revoked and the assignee thereof is entitled to vote; that instead of allowing the assignee of such stock to vote, the trust company will claim the right to vote.

It is apparent that the purpose of having inspectors appointed is the hope or expectation that such inspectors—being impartial between the interests—may possibly receive and count the votes cast by the assignees of the stock instead of the votes cast by the trust company under the proxies.

The claim is made that the parties to the agreement resident in Pennsylvania will continue in control of the company if the proxy agreement is carried out.

The primary question is the scope and purpose of the statutory authority under which this proceeding is brought, and the power and duty of the court, as well as that of inspectors who may be appointed pursuant to the statute.

In the first place it is important to note that this proceeding is in no sense a civil action in which controverted legal rights of parties may be presented and determined. It is not contemplated that petition, answer and reply shall be filed presenting controverted or uncontroverted facts for adjudication of the rights of parties. No *judgment* can be rendered, and no appeal or error can be prosecuted from any order made by court or judge. Under constitutional amendment of 1912 error can be prosecuted only from a judgment. Ohio Civil Trials (Revised Ed.), Sections 1213, 1285c, Article IV, Section 6, Constitution.

It is apparent that the hope and wish is that the holders of the stock, instead of the holder of the five-year irrevocable proxies, shall be permitted to vote. It has been intimated that if impartial inspectors of election are not appointed by the court, the rights of holders of the stock will probably be prejudiced by action of those in the majority, to whom the voting power has been assigned to the trust company.

It is difficult to perceive how legal rights may be prejudiced by any action taken at a stockholders' election. It is assumed that if the court does not appoint inspectors, that the meeting will be in the control of those having control of the proxies given pursuant to the agreement made.

In consideration of the application to appoint inspectors, the court is without power to actually determine the legality of the agreement and the proxies. It can merely express an opinion which may be neither sound nor respected, according to the views of interested parties. If the opinion should be against the validity of the contract and proxies, and inspectors were therefore appointed, the probable result might be that the contract and proxies would be disregarded and the parties for whose benefit the latter were given would lose control of the company contrary to the intent and purpose of the contract, provided the inspectors followed such opinion of the court.

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It certainly was not the design of the statutes, Secs. 8640 *et seq.* to thus determine important legal questions and rights.

In deciding whether the court considers the appointment of inspectors *proper and right*, it naturally is moved by its opinion concerning the validity of the contract by the terms of which the proxies were given. However, the court might well be content with refusing the appointment if it believed that by so doing contractual rights might thus be disturbed without proper legal adjudication.

It seems especially improper and unwise for the court to take action that might result in placing it within the power of inspectors to decide the legal questions and rights.

Furthermore, while inspectors who might be appointed probably would be governed by any opinion given by the court, or by any suggestion or direction so given, such action would be *coram non judice*, hence improper.

The powers and duties of inspectors appointed by the court, or selected by the meeting of stockholders, are that they—

“Shall receive and count the votes cast at such meeting, or at any adjournment thereof, either upon an election or for the decision of any question to be decided by vote, and determine the result.”

At such election the holder of the proxies as well as the holders of the stock would no doubt cast or offer to cast the votes. Inspectors appointed by the court would be called upon to decide which vote or votes shall be legally counted under the contract or according to law. Three laymen would be unable to make proper decision; and three lawyers could not intelligently decide the right to vote such stock without much consideration.

If the court should conclude that the holders of the stock, and not the holder of the proxies, were entitled to vote, and for this reason appoint inspectors, the result might be favorable to the holders of the stock. Such action would require those for whose benefit the proxies were given to commence legal proceeding for determination of the questions involved.

Legal proceedings should be instituted to obtain an adjudication without regard to any action taken by the court in this proceeding.

The expression—for whose benefit the proxies were given—it seems to the court goes to the heart of the legal question involved in the contract made between stockholders and those undertaking the management of the corporation, the refinancing thereof, and the purchase of stock.

Stockholders at elections of directors have the right to vote in person or by proxy. (Section 8636.) The policy of the law is that the voting power is an incident of ownership, and that it shall be exercised only by an owner or by one who has a beneficial ownership. The rule is that ownership and voting power shall not be separated. And it is true that an agreement between stockholders to confer the power to vote their stock for a lawful purpose is legal. But it is held that such agreement is revocable at any time notwithstanding it is in terms irrevocable. So long as the parties to any such lawful agreement, or their successors in interest are satisfied with any proper agreement, no other person can complain, and the irrevocable clause does not affect the rights of any one. This is the useful doctrine drawn from *Griffith v. Jewett*, 15 W. L. B., 419, by Peck, J.

It is incidentally remarked in *Railway v. State, ex rel*, 49 O. S., 668, 680, that an agreement whereby the stock is placed in the hands of trustees who are invested with the power of voting it as their interests may dictate, irrespective of the owners, is void as against the policy of corporation law.

So it is generally considered to be contrary to legal policy for stockholders to contract that stock may be voted just as someone having no beneficial interest or title thereto may direct, saving to the owner merely the title that stockholders are not permitted to surrender all their discretion and will in the important matter of voting and suffer themselves to be the mere passive instruments in the hands of some agent having no interest in the stock, *equitable* or *legal*, and *no interest* in the general prosperity of the corporation. This is the doctrine of *Shepang Voting Trust Case*, 60 Conn., 553, citing with approval *Griffith v. Jewett, supra*, and relied upon by counsel in this case.

In the decisions condemning transfers of the voting power, uncoupled with an interest, exception to the rule of an interest in the welfare of the company is generally recognized. If the

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person to whom the power is transferred is actuated by an interest in the welfare of the company, the proxy is to be regarded as proper and legal.

Luthy v. Ream, 270 Ill., 170, strongly urged by counsel, has been carefully examined by the court. It appears that a voting trust by which a stockholder owning but a few shares of stock is made trustee for a majority of the stock with power, alone, to elect three of the five directors, for ten years, with power to formulate and determine the policy of the corporation unrestrained and uninfluenced by the other stockholders, is held by this Illinois decision not binding, from which any stockholder or purchaser of stock with notice of the agreement may withdraw and compel the trustee to deliver the stock.

The court, however, concedes the right of a majority of stockholders to combine for the purpose of controlling the corporation, and it recognizes the right of stockholders to pool their stock for the purpose of electing directors and officers and for controlling the management of the business of the corporation. This it holds not to be necessarily illegal. It holds that there is no such thing as an irrevocable proxy to vote stock *not coupled with any interest in the stock itself* other than the right to vote it.

This decision, based as it is on materially different conditions, as is also *Griffith v. Jewett*, 15 W. L. Bull., 419, and *Shepang Voting Trust*, 60 Conn., 553, relied upon by counsel, are not to be regarded as relevant to the facts of this case, except as recognition is given general doctrines having pertinent relation thereto. *Railway v. State*, 49 O. S., 668, is not relevant to the facts in this case.

Boyer v. Nesbitt, 227 Pa. St., 398; 136 Am. St., 890, is an instructive and controlling authority. It recognizes the general doctrine prohibiting the separation of the voting power from the beneficial interest in the corporate stock; it adheres to the settled rule that to justify such separation there must be a *property interest* of the corporation to be carried out, some beneficial interest of the stockholders to be served, or some purpose not unlawful and of an advantageous character to the stockholders to be effectuated. The Pennsylvania court found that there was a property interest to conserve, a *definite policy* of the corporation

in the interest of the stockholders to be carried out and a lawful purpose beneficial to all concerned to be effectuated. This is precisely the situation presented by the contract in the present case.

All the cases, say the court, turn upon the question whether the irrevocable trust is or is not coupled with an interest. If coupled with an interest such agreements have been generally sustained, but if not coupled with an interest they are regarded as in the nature of a revocable power.

Combining corporate stock by an agreement with an object to carry out a particular policy to promote the best interests of all the stockholders is held not necessarily illegal. *Chapman v. Bates*, 61 N. J. Eq., 658; 88 Am. St., 459.

This is what was done in this case. A general plan and policy was adopted to rehabilitate the corporation. The voting power of the 1,900 shares of stock was given in trust for the benefit of the owners thereof as well as for the general welfare of the corporation.

In *Smith v. Railway*, 115 Cal., 584; 56 Am. St., 119, it was held that a proxy may be made irrevocable for a term of years as the result of a contract between the purchasers of stock in the corporation that a majority of them shall vote it as a unit during such term; that it is not in violation of public policy or any rule of law for stockholders owning a majority of stock in a corporation to cause its affairs to be managed in such way as they think best calculated to further the ends of the corporation, and, for this purpose, to appoint one or more proxies to so vote it in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or what officers they will elect, or they may unite in the appointment of a single proxy to effect that purpose.

The foregoing review of cases sufficiently shows the proper doctrine to be applied to the facts of the present controversy.

The controlling stockholders desired and planned a new policy, refinancing and new management, looking to better results, beneficial to the corporation and its stockholders.

It was the desire of the holders of 1,900 out of 2,250 shares of stock to secure the services of competent parties to take over the

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management, operation and control of the plant and business of the corporation, and to provide for the refinancing of the company. It provided that the Davisons and Meyer, the new directors and managers, should purchase the remaining \$25,000 of the authorized capital stock. These parties were to be paid for their services in refinancing and managing the company by a \$50,000 increase of the capital stock of the company. An agreement was made as to who should be officers of the company.

It was provided that the management, operation and control of the corporation should be in George S. Davison, as president, Allen S. Davison, as treasurer, and Albert P. Meyer, as secretary.

In refinancing the company the loan of \$100,000 was secured from the trust company which was guaranteed by Davison. The loan was made in reliance upon the agreement including the delivery of irrevocable proxies to the trust company which was part of the contract, as well as the contract for the management and control of the corporation for the period of five years.

The delivery of the proxies to the trust company was a material part of the agreement and was made for the immediate and direct benefit of the holders and owners of the 1,900 shares of stock—parties to such agreement. While the voting power is vested in the trust company, it is not only for the benefit of the Davisons and Meyer, but it is for the immediate benefit of the holders of the 1,900 shares of stock, as well as all the stock of the company; but the trust company having loaned the corporation \$100,000 has a property interest in the corporation; it has a legal and equitable interest; it has an interest in the property of the corporation; it has an interest in the welfare of the corporation in that it shall be sufficiently successful in its business, so as to be able to pay off and discharge the \$100,000 loan. The trust company has an interest in the stock to the extent that it may have a voice and share in the control and management to the end that its loan may be secure.

The trust company has such legal and equitable interest in the company and in the stock itself as brings it within the rule which sanctions separation of the voting power from the ownership of the stock.

Plainly, therefore, the lodgment of this voting power for the

period specified was coupled with important financial interests for the material benefit of not only the 1,900 shares of stock, but of all the stock and the bonded loan as well.

The voting power was placed in trust to accomplish purposes for the primary benefit of its owners, and to give greater guaranty and security to the trust company, which was to loan the corporation \$100,000. It probably would have been unwilling to have made the loan unless the complete management was thus placed in persons known to it.

In respect to the claims that some of the parties to such proxy agreement have sold their stock, and that their proxies have been revoked.

Being of the opinion that the agreement and proxies were legal and for the benefit of the owners of the 1,900 shares of stock, the further conclusion must be reached that every assignee of any of such 1,900 shares of stock took the same with full notice of the contract and irrevocable five-year proxies.

In *Boyer v. Nesbitt, supra*, it was held that:

“The appellant purchased his stock with full notice of the agreement, and took it impressed with the trust. He is not a purchaser without notice, and if the agreement is valid he is bound by its terms.”

The fact that an irrevocable proxy was given by the holder of the stock pursuant to an agreement was endorsed on each certificate, wherein was stated in substance the fact of such agreement and of an irrevocable proxy to the Union trustee for five years.

For the reasons stated the court does not deem it proper to appoint inspectors. Such appointment would only further complicate matters and would accomplish nothing in the way of settlement of questions. I can see no advantage in appointing inspectors for the purpose of making a record. *Quo warranto* proceedings would readily settle the questions which can not be determined in this manner.

Under all the circumstances the court does not deem it proper to appoint inspectors. The application is therefore denied.

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Smith v. McGoron.

DEFECTIVE SERVICE ON A GARNISHEE.

Common Pleas Court of Hamilton County.

RICHARD SMITH v. JOHN R. MCGORON.

Decided, February 15, 1917.

Attachment and Garnishment—Service on a Garnishee Doing Business Under a Fictitious Name—Not Sufficient Where Summons is Left at Office.

Under Section 10266, if the garnishee is a person, the copy of the order and notice shall be served upon him personally, or left at his usual place of residence. Service on a manager for a person doing business under a fictitious name, which is not a partnership, is not a good service under the above section.

Charles A. Lowe, for plaintiff in error.

Wm. R. Collins, contra.

MAY, J.

This proceeding in error is to reverse judgment of the municipal court awarding judgment to the defendant in error.

McGoron originally brought a suit before Clifford S. Cordes, justice of the peace, against S. B. Burwell, and garnisheed Richard Smith and James Smith, doing business as Eastern Machinery Company. The constable's return in that suit reads as follows:

“Received this writ on the 6th day of December, 1915, and on the 7th day of December, 1915, I served the same on the defendant by leaving a certified copy thereof, and of the endorsements thereon with him personally.

“And on the 7th day of December, 1915, at 2 o'clock p. m., I served said within named garnishee with a copy of the within order and notice to garnishee, by leaving the said copies with manager in charge, Richard Smith.”

In that suit McGoron recovered a judgment for \$62.50. The garnishee failed to answer the attachment and summons, and after demand upon the defendant to pay the amount of the

judgment was refused, McGoron brought a suit against Richard Smith and James Smith, doing business as Eastern Machinery Company, for the amount of the judgment obtained in the original suit against Burwell.

Richard Smith maintains that he was not personally served with the order and notice of garnishment in the Burwell suit, and that under Section 10266, there is no valid order upon which judgment in this case can be predicated.

I have read carefully the bill of exceptions, and am of the opinion that the greater weight of the evidence shows that Richard Smith was not personally served in the suit of *McGoron v. Burwell*. The constable's return does show that he was served as manager, but the constable could not identify Smith as the man be served. Smith and Burwell both testified that Smith was not in the city at the time of the alleged service. According to the opinion of the trial court, which is part of the record in the case, the learned judge thought it unnecessary under Section 10266 to have a personal service on Richard Smith. In his opinion, the learned judge says:

“The law does not make it necessary to serve one personally. The service in this case—at the office, Mr. Burwell testifying he is the manager in charge of the business, upon Mr. Smith, he being out of town—is sufficient for all intents and purposes of service of garnishee. Mr. Burwell testified he did not receive this service on Mr. Smith, yet some one did receive that service. For that reason, regardless of the fact whether Mr. Smith was served personally, the uncontroverted fact that there was a regular service at the regular place of business of the garnishee is sufficient in this case. For that reason the court must find for the plaintiff, and does so find.”

Being of the opinion, after a careful reading of the record in this case that the finding, that there was a personal service on Richard Smith, is manifestly against the weight of the evidence, and being further of the opinion that under Section 10266, it being undisputed in this case that Smith was doing business as an individual and not as a partnership, there was no good service, the attachment below is contrary to law, and for that reason the case is reversed and remanded for further proceedings.

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Counsel for defendant in error earnestly contends that because Smith was doing business under a fictitious name he ought not to be permitted to take advantage of this fact, the plaintiff below having proceeded upon the theory that the Eastern Machinery Company was a partnership.

The provisions of the General Code requiring the registration of fictitious partnerships refer only to partnerships, not to an individual doing business under a fictitious name. Therefore, there is no estoppel on the part of Smith to attack directly the service in the original garnishment proceedings.

PAINTER INJURED BY BREAKING OF A LADDER.

Common Pleas Court of Greene County.

GUY L. HARNER v. CHARLES S. JOHNSON.

Decided, March, 1917.

Negligence—A Ladder is a Simple Tool—Action for Injuries Due to the Breaking of—Not Within the Employer's Liability Act.

1. An action for damage by an employee for an injury occasioned by the breaking of a ladder furnished by the employer does not come within the employer's liability act, for the reason that a ladder is a simple tool and the employer has the right of the defense of assumed risk and contributory negligence.
2. The employee having equal or greater opportunity to learn of any defects in a ladder used by him is chargeable with knowledge, and being a simple tool assumes the risk in the use of the same.

L. J. Lehman and W. S. Rhotehamel, for plaintiff.

M. Shoup, contra.

KYLE, J.

This cause is submitted to the court upon a demurrer to the amended petition on the ground that it does not state a good cause of action against the defendant.

This action is brought under the employers' liability act.

The plaintiff claims that the defendant employed five workmen, or more, regularly in the same business, and did not pay the state insurance fund, as provided by law, and that he was

employed by the defendant to paint a certain chimney, and in performing the work the ladder broke and he was injured.

The first question presented is whether or not injury from the breaking of a ladder comes within the statute.

Section 6243 provides—

“that if the employee of such employer shall receive any personal injury by reason of any defect or unsafe condition in any ways * * * appliances or tools, *except simple tools*, in any way connected with or in any way used in the business of the employer, such employer shall be deemed to have knowledge of such defect,” etc.

In Section 6243 the defective or unsafe condition relates to “appliances or tools, *except simple tools*.”

In 96 Wisconsin, page 409, the court says:

“A ladder is one of the most simple contrivances in general use.”

In 127 Missouri, 566, is a case where the servant had been injured in the use of a ladder, and the court says:

“The appliance (the ladder) in question was a simple one.”

106 New York, page 518:

“A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dullest intellect.”

28 Rhode Island, page 257:

“A ladder is to be classed with ordinary hand tools.”

7 N.P.(N.S.), 489 on 497; 19 Ohio Decisions, page 70, in commenting upon the 40 Ohio State, says:

“The injury in that case was caused by a machine and not by a simple appliance like a ladder.”

From the foregoing authorities I am of the opinion that a ladder is a simple tool, and being a simple tool does not come within the provisions under Sections 6243 and 6245, *et sequiter*.

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If it does not come within the employers' liability act there can be no question of assumption of risk, and the defendant can not be deprived of his defense of contributory negligence.

In the use of simple tools, to which class the ladder belongs, an employee using the same is equally chargeable with the master with knowledge of its obvious imperfections. (28 Rhode Island, 257.)

No reason can be perceived why the plaintiff, brought into daily contact with the tools used by him, should not be held chargeable equally with the defendant with knowledge of their imperfections. (101 N. Y., 396; 106 N. Y., 518.)

The plaintiff in this case is seeking to charge the defendant with negligence for not discovering the rotten condition of the double-section extension ladder which broke, which the plaintiff, with superior means of observation, claims and alleges that "he could not by an inspection of said ladder have discovered the rotten condition of said part of said double-section extension ladder which broke."

The rule is stated in 98 Wisconsin, page 409, to be:

"Whether a tool is defective so as to render the person responsible for its reasonable safety for use liable to damages to an employee injured by some failure of duty in that regard must be determined in the light of all the circumstances bearing on the question, and particularly the right of such person to rely on the duty of such employee to use ordinary care for his own safety."

In this case the plaintiff says that one part of the double-section extension ladder was resting upon the eaves, and adjoining to and close to the chimney which the plaintiff was painting, and says:

"It was necessary for him to step upon and stand upon the rung of said double-section extension ladder immediately above the eaves of said house, and when said plaintiff, without any fault or negligence on his part, stepped upon the rung of said double-section extension ladder the left side of said double-section extension ladder * * * broke."

The matter of placing the ladder was entirely with the plaintiff, and the manner in which he alleges that he used the ladder

raises a presumption that the plaintiff was guilty of contributory negligence.

The plaintiff does not allege anywhere in his petition that the ladder was rotten. He alleges that he could not by inspection have discovered the rotten condition, but says the defendant knew, or by the exercise of ordinary care could have known, the decayed and rotten condition of said ladder. It would necessarily be true that unless the ladder was in a rotten condition it could not be discovered by the plaintiff by inspection, neither could it be discovered by the defendant, and in the absence of any allegation that it was rotten or in a rotten condition the court could not assume that it was by reason of the fact that the plaintiff says that the defendant could have discovered it if he had examined the same, for you could not discover a condition that did not exist, and in the absence of an averment to that effect such condition could not be presumed to exist.

The plaintiff avers that he did not know of the defect, but does not say that he had not equal means of knowing with his employer. (49 Ohio State, 607.)

In order to make out his case it would be necessary for the plaintiff to prove that the ladder was in a rotten condition and defective, but in the absence of any averment to that effect he could not make proof, and, therefore, his petition must fail.

It is my opinion, therefore, that this cause of action does not come within the employers' liability act by reason of a ladder being a simple tool, and the defendant has the right of defense of assumed risk and contributory negligence on the part of the plaintiff. The plaintiff having equal and greater opportunity to learn of any defects in the ladder is chargeable with knowledge, and being a simple tool assumes the risk in the use of the same.

The manner of placing the ladder against the building was entirely the act of the plaintiff, and upon the face of the petition it would also seem that his manner of use in climbing above the eaves of the house and resting upon the rung raises a presumption of contributory negligence which is not overcome by any other allegation in the petition. For the foregoing reasons I think the demurrer to the amended petition should be sustained.

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ACTION AGAINST BOTH MASTER AND SERVANT.

Common Pleas Court of Hamilton County.

WILLIAM CORDES, ADMINISTRATOR, v. ROBERT H. DOEPKE ET AL.

Decided, May 19, 1917.

Action for Injuries Negligently Caused—Both Master and Servant Made Defendants—Subsequent Election to Proceed Against the Servant—Does Not Give Right to Docket Separate Cause Against the Master—Such an Action Distinguished From Those Separately Brought Against Joint Tort Feasors—Where Judgment Against One Could Not be Pleaded in Bar as to the Other.

1. After a motion to elect as to which defendant plaintiff will proceed against has been granted in an action where the plaintiff has sued both the master and servant, and the plaintiff elected to proceed against the servant, his request to have a separate cause of action docketed against the master will not be granted for the reason that there is no statutory provision permitting such procedure and for the further reason that in an action of this kind the most liberal construction of Section 11312, General Code, does not authorize this.
2. A petition against master and servant, which, upon its face, is not demurrable, but which, after the close of the plaintiff's case, is subject to a motion to elect, sets up but one cause of action, and it is not in the interest of justice, where a motion to elect has been granted and acted upon by the plaintiff, to permit the docketing of a separate cause of action against the party defendant who has been dismissed from the pending cause. The plaintiff could have originally sued the master and the servant separately, but a judgment in either suit could be pleaded in bar of the proceedings to the other suit. A suit of this kind is different from actions separately brought against joint tortfeasors where the judgment in the one suit can not be pleaded in bar and where both tortfeasors would be liable until a judgment against either has been satisfied.

Simeon M. Johnson, for the motion.

Kramer & Bettman, contra.

MAY, J.

The plaintiff in this case originally sued the Alms & Doepke Company, a corporation, and Robert H. Doepke, individually,

for the negligent killing of the plaintiff's intestate by the defendant, Robert H. Doepke, in the course of his employment as the servant of the Alms & Doepke Company.

At the first trial of this case, at the close of the plaintiff's testimony, a motion to elect, filed on behalf of each defendant, was overruled, and a joint judgment was entered against both defendants, against whom the jury found a joint verdict.

The court of appeals, in the case of *Doepke v. Cordes*, case 600, court of appeals, reversed the case, holding that the court below erred in not granting the motion to elect.

At the second trial of the case, at the close of the plaintiff's evidence, each defendant filed a motion to elect and the court granted the motion. The plaintiff, in accordance with the ruling of the court, elected to proceed against Robert H. Doepke and "at the same time moved the court to allow him to file a separate petition against the defendant, the Alms & Doepke Company, on the separate cause of action attempted to be set up against said company in the original petition and that a separate action be docketed against said defendant upon the filing of said petition."

The plaintiff contends that under Section 11312, General Code, his motion should be granted.

That section reads as follows:

"When a demurrer is sustained on the ground of misjoinder of several causes of action, on motion of the plaintiff the court may allow him, with or without costs, to file several petitions, each including such of the causes of action as might have been joined, and an action shall be docketed for each of the petitions, and be proceeded in without further service."

The plaintiff contends that under the decision of Judge Gholson, in the case of *Cloon v. City Insurance Company*, 1 Handy, 32, at 35, it is not too late to have his request granted after the motion to elect has been granted.

In that case Judge Gholson did say that where misjoinder had not been taken advantage of by demurrer, but by answer, the plaintiff would have been entitled to the privileges granted un-

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der Section 90 of the code, which is practically Section 11312 of the General Code. The case that Judge Gholson had before him was a case directly covered by the statute, for the reason that the ground of misjoinder was the joining of the several causes of action. In the case at bar there is but one cause of action stated, based upon negligence of Robert Doepke while engaged in and about the business of the Alms & Doepke Company.

Counsel for plaintiff contends that there are two causes of action stated, one against Robert H. Doepke in trespass, and one against the Alms & Doepke Company, on account of negligence of Robert H. Doepke, its servant.

The evidence, in my opinion, showed only one cause of action, namely, that based upon the negligence of Robert H. Doepke.

The court of appeals was of the same opinion. Judge Gorman, speaking for himself and Judge Oliver B. Jones, said:

“It is claimed in this case that the injury to Cordes was the result of an act of trespass, but a perusal of the petition does not disclose any averment of willful trespass or act of direct trespass, but the averments are that the injury was caused by the negligence, recklessness and carelessness of Robert H. Doepke. In other words, plaintiff's right to recover is bottomed not on trespass *vi et armis*, but upon culpable negligence, a failure to observe due care to avoid injuring Cordes.

“In this case, if the Alms & Doepke Company is liable at all, it must be upon the principle of *respondeat superior*, because it was the principal or master of Robert H. Doepke.” * * *

Counsel for plaintiff, however, contends further that although they are not within the letter of Section 11312 of the General Code, they are within the spirit of that section, and cite in support of this proposition a decision of the circuit court, by Giffen, J., in the case of *Morris v. Anchor Fire Ins. Co. et al*, 12 C.C. (N.S.), 79, where it was held:

“A liberal construction of the civil code in furtherance of justice requires that where separate causes of action against several defendants are improperly joined, the plaintiff be permitted to file a petition against each defendant as provided by Section 5064, Revised Statutes” (now G. C., Section 11312).

I have examined the record in that case, and it discloses the fact that there were separate causes of action against several defendants, each of which was independent and separate and based upon a different state of facts. That case was taken to the Supreme Court, but was settled and dismissed before the Supreme Court passed upon the merits of the case.

Conceding, for the sake of argument, that the decision in the Morris case is the law of this state, I am of the opinion that the principle there announced should not be extended beyond the facts of the case; that is to say, where separate causes of action are stated in a petition against several defendants. The principle there announced, even if it should be held that it may be invoked after a motion to elect has been granted, should not be extended to a state of facts where there is but one cause of action stated against each defendant, who can not be properly joined. If the Legislature had intended that where a demurrer for misjoinder of parties defendant had been granted, that the plaintiff should be allowed to file a separate petition against the defendant wrongfully joined, it would have expressly stated it.

In the opinion of the court of appeals in the instant case, the court said:

“If a demurrer to the petition had been interposed on the ground of misjoinder of parties defendant, and sustained by the court, there would have to be a dismissal of the action. One of the parties could not be dismissed and the cause proceed against the other. True, a new action could be brought against either defendant, but the petition could not be amended so as to convert an action against joint tort feasons into an action against one only. The right to require the plaintiff to elect which of the defendants he desired to pursue, when at the close of the case it appeared from the evidence that there was no joint liability, was not waived by failure to demur or object by answer.

“The effect of granting this motion would not cause a dismissal of the action, as that right was waived by the failure to demur or set up the objection by answer, but it would result in a dismissal of one of the defendants and the cause could then proceed against the other.”

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It is earnestly urged, however, that in furtherance of justice the motion of the plaintiff should be allowed. But it is questionable whether this court would be furthering the interests of justice in granting the plaintiff's motion, even if there were authority to do so, for the reason that the plaintiff's right of action is against either Doepke, individually, as the servant of the Alms & Doepke Company, who committed the acts complained of, or against the Alms & Doepke Company, on the doctrine of *respondeat superior*. While it is true that the plaintiff could have filed separate suits against Robert H. Doepke and the Alms & Doepke Company, nevertheless it is a well settled principle of law that a judgment in the one suit could be pleaded as bar in the other suit because the parties are the same; that is, the party plaintiff is the same, and the party defendant in the one suit is privy to the party defendant in the other suit, and a case of this kind differs from a case in which the allegation is that two different parties have committed a tort to the person or property of the plaintiff and thus each would be individually liable. See 2 *Mecham on Agency*, Section 2010, and cases cited. See especially, *Castle v. Noyes*, 14 N. Y., 329; *Anderson v. West Chicago Street R. R. Co.*, 200 Ill., 329.

The plaintiff in this case is not deprived of any substantial right by refusal to grant this motion, because the servant in this case is well able to satisfy any judgment the plaintiff may recover against him.

For these reasons, the motion of the plaintiff to have docketed a separate cause of action against the Alms & Doepke Company will be overruled.

DETERMINATION AS TO THE CHARACTER OF A DEVISE.

Common Pleas Court of Richland County.

EDITH LAVER V. MARTIN KREITER.

Decided, April 25, 1917.

Remainder—Devise of Life Estate to Sons—With Fee to Children of Last Life Tenant—Creates a Contingent and Not a Vested Estate—Conveyance of Such an Estate by Quit-claim Deed Ineffectual—Restoration of Purchase Money for Said Interest Ordered in Proceeding for Partition.

1. Where in a will a testator devised to his two sons the equal use and enjoyment of the rents and profits of certain real estate during their lives, or during the natural life of the surviving one of them; and then, at the decease of the surviving one of them devised said real estate to the children of his said sons, surviving the last life tenant,

Held: That the remainder thus created was a contingent remainder, the right of enjoyment depending upon the uncertainty of survivorship among said children, and a child of either one of said sons had no alienable interest in said land until the death of the last life tenant.

2. Where, in such case, the only child of one of the sons, before the death of the last life tenant, executes and delivers a quit-claim deed, without any covenants of warranty, to a third party for a valuable consideration, said quit-claim deed creates no estoppel, and is ineffectual to convey any interest whatever in said premises; and such grantee is without title to effect a conveyance of said interest by deed of general warranty, though executed and delivered for a valuable consideration.
3. In such case, equity requires the restoration of any money paid or advanced for the execution and delivery of said quit-claim deed on its cancellation by the order of the court.

C. H. Workman, for plaintiff.

H. T. Manner and *C. H. Workman*, for defendant, Harold Laver.

Van C. Cook, for defendant, Martin Kreiter.

W. R. Gifford and *C. E. McBride*, for defendants, Fox, Boals, McClure and Zellers.

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MANSFIELD, J.

Philip Laver died testate in November, 1898, seized of certain valuable real estate in this city.

By items two and three of his will he makes disposition of his real estate as follows:

Item 2. "I will and devise to my two sons, George M. Laver and Philip J. Laver, the equal use and enjoyment of the rents and profits of my real estate during their natural lives, or during the natural life of the surviving one of them to descend as hereinafter designated in Item three."

Item 3. "At the decease of my said sons George M. Laver and Philip J. Laver or the surviving one of them, I will and devise my real estate in Item 2, referred to, to the heirs of the body of my said son, namely, the children of my said son George M. Laver, the share to which he would be entitled and to the children of my said son Philip J. Laver, the share to which he would be entitled if living, and if at the decease of the surviving one of my said sons, George M. or Philip Laver, the heirs of the body of either shall have deceased, then I devise to the heirs of either so surviving their heirs and assigns said real estate in fee simple."

The two sons of the testator named in the will, namely, Philip J. Laver and George M. Laver, at the death of testator had each one child, Edith Laver being the daughter of Philip J. Laver, and Harold Laver being a son of George M. Laver.

Philip J. Laver, the father of Edith, died about the year 1908, being then about 55 years of age. George M. Laver died November 5, 1915, about 63 years of age, and at the time of his death was in the complete enjoyment of the life estate both in his own right and right of survivorship to his brother's interest to the real estate named. Harold Laver, the son of George M. Laver, at the time of his father's death was about 30 years old.

On December 2, 1912, about three years prior to the death of his father, George M. Laver, Harold Laver released and quit claimed his interest in the real estate in question to one Martin Kreiter for a valuable consideration, and on November 22, 1915, Martin Kreiter sold this interest by deed of general warranty

to Boals, Zellers and others, named as defendants in this case. The surviving life tenant, George M. Laver, died on November 5, 1915, and on November 15, 1915, Edith Laver, surviving daughter of Philip J. Laver, filed this proceeding in partition making Harold Laver, Martin Kreiter, Zellers, McClure et al, parties defendant. On hearing of the partition proceedings, partition was ordered of the premises; subsequently the property was sold in that proceeding, one-half the proceeds ordered distributed to the plaintiff, Edith Laver, and the balance held to await an order of distribution upon the issues raised by the pleadings filed by Martin Kreiter, Harold J. Laver and defendants, Boals, Zellers et al.

The question is presented in the first instance under the will of the testator, Philip Laver, Sr., whether the devise to the children of the devisees creates a contingent or vested remainder, and to determine this question involves the construction of said will, for if the interest to the children of devisees was a vested interest then an inquiry may be made further into the issues of fraud raised by the answer and cross-petition of defendant Harold J. Laver and also the question in *lis pendens*, but if such interest was simply a contingent remainder, that is, the title to the children under the will did not vest until the death of the surviving life tenant, that would determine the case for the reason that the deed from Harold Laver to Kreiter being merely a quit-claim without any covenants of warranty, no estoppel would arise to defeat his alleged claim as a tenant in common with his cousin, Edith Laver.

A vested remainder is an estate *in presenti* although to be enjoyed in the future. A contingent remainder is an estate to vest upon the happening of some future event. So in the case at bar we have the question, was there a vested remainder, the enjoyment of which was simply postponed until the happening of a future event, or was the vesting deferred until the happening of a future event.

The law favors the vesting of estates from the time of the death of the testator, unless it appears from the terms of the will that the vesting depended upon a condition precedent to its

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taking effect, and rules of construction give way to intention of the testator as may be gleaned from the terms of the will. Now in the will in question, it will be observed that the testator after the decease of the life tenants does not devise to certain designated persons and their heirs, but he devises after the termination of the life estate "to the heirs of the body of my said sons," namely, "the children of my said son George M. Laver the share to which he would be entitled and to the children of my said son Philip J. Laver, the share to which he would be entitled if living, and if at the decease of the surviving one of my said sons George M. or Philip Laver, the heirs of the body of either shall have deceased, then I devise to the heirs of either so surviving their heirs and assigns said real estate in fee simple."

It is to be observed that by this language, by the words "heirs of the body of my said sons," he explicitly states what he means by that expression, namely, the children of said sons; that is, I take it that by fair construction what the testator meant in the use of the terms employed was that before the right of possession could be exercised by the children of either, they must not only survive their own father, but survive the surviving life tenant. Here is an uncertainty both as to the persons who are to take and also as to the time of enjoyment; it is not merely the postponement of enjoyment, but an uncertainty of enjoyment depending upon survivorship; that is, the children or issue of either of the life tenants had no right or enjoyment upon the death of their father, but such right hung upon a further contingency that they must survive the surviving life tenant; it was not a devise to a life tenant and at his death to his heirs, but in the estate in question the life estates were carved out and a remainder to the children of either depending upon the survivorship of the last life tenant.

It appears to the court, from any analysis of this will, that it was not the intention of the testator that the interest of the remaindermen should vest at the time of the testator's death, and that the interest to the children of either was a mere contingent interest depending upon survivorship with no certainty

as to who would take and consequently could not vest except at the time appointed by the terms of the will; that is, at the death of the last surviving life tenant. In other words, under the terms of this will before the child of either of the life tenants could take a vested interest he or she must survive the last life tenant. If this is not true, then if a child of either die before the death of the surviving life tenant, the heirs of such deceased child would take, which would practically annul the provisions of the will providing for the right of survivorship in the child or children of either life tenant who survived the last life tenant.

In *Spear v. Fogg*, 87 Maine, 132, the will under construction reads:

"I give to my sisters Mary S. Pecker and Frances S. Fogg in equal shares, all the rest and residue of my estate, real, personal and mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, have and to hold the same for and during the terms of their natural lives, and at their decease to descend to their children respectively, and to be equally divided among them or to the survivors of them."

Held that the devise created a contingent and not a vested remainder in the children of the devisees.

In the opinion of the court on page 139 is found the following language:

"If the estate were to be construed as vesting at the death of the testator, then one of the heirs might convey his share by deed, and if he died before the termination of the life estate leaving heirs his conveyance might defeat their estate, which would be contrary to the expressed provisions of the will."

While I think that perhaps the distinction between contingent and vested remainders are drawn closer in the state of Maine than in Ohio, yet the above case I believe to be sound in reason and principle and in harmony with the announcement of our Supreme Court.

In *Sinton v. Boyd*, 19 Ohio St., 30, it is held:

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"1. In the construction of wills words of survivorship should be referred to the period appointed by the will for the payment or distribution of the subject-matter of the gift, unless a contrary intention is evinced by the language of the will.

"2. Where a testator gave all his estate to his wife for life and directed that all remaining after her death should be divided by his executors equally amongst his children, or the survivors of them, and after his decease one of the children died before the death of testator's widow, leaving a child;" *held*, that no interest vested in the deceased child under the will and that the grandchild of the testator was not entitled to share in the estate as one of the children or survivors among whom it was to be distributed.

In the opinion of the court, on page 35, there is a reference to the English case of *Young v. Robinson*, 8 Jurist (N. S.), 825, decided in the House of Lords in 1862. In that case it was held, upon the authorities as well as upon principle, to be the rule "that where there is a clause of survivorship, *prima facie* survivorship means the time at which the property comes into enjoyment, that is to say that if there be no previous life estate at the death of testator; if there be a previous life estate then at the termination of that life estate."

And on page 36, same opinion, the court announces its conclusion as to whether the interest involved in that controversy was vested and says:

"It is clear then that, during the life of the widow, no interest in this leasehold vested in the father of Kate J. Boyd. He died before the time for the distribution of the estate arrived; therefore nothing vested in him or his heir for the distribution was to be made only amongst the 'children' of the testator that might be surviving at the time mentioned in the will for the distribution."

And the case of *Sinton v. Boyd*, *supra*, was approved and followed in the case of *Barr v. Denney*, 79 Ohio St., 358.

The case of *Linton v. Laycock*, 33 Ohio St., 128, is cited as authority that the interest of Harold Laver was vested at the death of his grandfather. I do not think it fully sustains coun-

sel in that respect. Referring to the opinion in that case at page 135 I quote:

“There is then no doubt but that the estate vested in the children of the testator at his death, unless the words ‘then living or their heirs’ in the clause directing the division, changes the case and makes the estate contingent. No other indication is contained in the will of an intention to create a condition precedent to the vesting of the estate. Nor do we think the testator so intended by this clause, for he does not thereby impose any condition of survivorship or give to his children then living any advantage thereby, in the view we take of the meaning of the words ‘or their heirs.’ Those words in a sense, it is true, might refer to the living children and thus operate as a condition subsequent, divesting a child who might die before the period named. But we do not regard that as being the meaning of the testator.”

In the case at bar there is no mistaking the use of the words “imposing conditions of survivorship” by the testator; in fact, upon the reading of the whole will the court is impressed that the conditions of survivorship was the important thing that was uppermost in the mind of the testator, and that no estate was to vest except upon the conditions so imposed, and it further clearly appears by the expressed terms of the will he gives to the survivors an express advantage.

The case of *Jeffers v. Lampson*, 10 Ohio St., 102, is claimed as an authority to sustain the contention that Harold Laver had a vested interest at the time of making the deed to Martin Kreiter. In the will involved in that case, the testator gave his property to his wife for life and at her death to his two sons William and Henry, to them and their assigns forever, and then provided if either of my said sons William or Henry shall happen to die before my wife, then it is my desire that the survivor at her decease shall leave the whole of the property to him and his heirs and assigns forever. It was held that during the life of the wife the contingent interest of William was in law releasable to Henry and passed by such release.

But it will be observed that this will is radically different, as I take it, from the will involved in the case at bar. Under

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the terms of this will, there was no question of a fixed and definite interest in both William and Henry in the estate devised by their father. The contingency provided by the will simply enlarged that interest in case of the happening of the event upon which the contingency depended. But in the case at bar, the right of any interest depended upon survivorship; no interest could attach or vest in Harold Laver unless he survived the last surviving life tenant, and the will fails to give him or any of the children any estate but a contingent remainder in the real estate, all depending upon such child or children surviving the last life tenant.

So I am inclined to think that the case of *Jeffers v. Lampson, supra*, is not applicable to this case. I therefore hold that at the time Harold Laver made the quit-claim deed in question, he had no vested interest in the real estate involved in this controversy, and therefore that his deed of quit-claim releasing his interest to Martin Kreiter conveyed nothing to Martin Kreiter, and that as between him and Martin Kreiter and Kreiter's grantees that Harold Laver is entitled to the distribution of the funds now in the hands of the court.

It appears, however, that Martin Kreiter has paid certain debts and claims on behalf of Laver growing out of the transaction in question, and also advanced to him some money for the use of himself and wife at the time the deed was made. In equity this should be taken care of in any final distribution. It will therefore be ordered that from the funds now in the hands of the sheriff that, *first*, the costs of this proceeding first be deducted; *second*, that there be paid to Martin Kreiter the amount that he has advanced and paid on account of Harold Laver, and *third*, that the balance of the fund be turned over to Harold Laver.

Having determined the above question it is unnecessary to pass upon the other issues in the case.

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**DAMAGE TO A SHIPMENT DIVERTED FROM ITS
DESIGNATED ROUTE.**

Common Pleas Court of Hamilton County.

SAMUEL FRANK AND CHARLES FRANK V. LOUISVILLE & NASHVILLE
RAILROAD COMPANY.

Decided, January Term, 1917.

*Carriers—Defense of Necessity for Diversion of a Shipment from the
Prescribed Route—Duty of Consignee with Reference to Damage to
Goods After Arrival—Pleading.*

1. In an action for recovery of damages to a shipment of goods diverted from the prescribed route, admissions in the pleadings that a physical necessity required that the car be sent over another than its designated route for a part of its journey but that its arrival was delayed only a few hours and the consignee had notice of arrival, is sufficient to relieve the carrier from liability for damages suffered by said goods after arrival at the city to which they were shipped.
2. It is the duty of a consignee to minimize as far as possible any damage likely to occur to a shipment, and failure so to do is a proper subject of defense in an action against the carrier on account of loss which the carrier might have prevented in whole or in part.

Robert S. Marx, for the plaintiffs.

Kinhead & Rogers, contra.

CUSHING, J.

In this action the plaintiff claims damages from the defendant company. The allegation of negligence stated in plaintiff's amended petition is that the defendant carelessly and negligently, without notice to the consignor, or the consignee, delivered a car of beans to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company at Cincinnati, instead of to the Cincinnati, Hamilton & Dayton Railroad Company.

The record is that the shipment was made from New Orleans by way of the Louisville & Nashville Railroad, with direction

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to deliver to the Cincinnati, Hamilton & Dayton Railroad Company at Cincinnati, Ohio.

The testimony in the case is practically undisputed. The plaintiff expected this shipment to arrive by way of the Cincinnati, Hamilton & Dayton Railroad Company, Friday afternoon or evening, May 23, 1913. It arrived in Dayton at 1:18 A. M., May 24, 1913.

By way of defense, the answer of the defendant states that at the time said shipment arrived in Cincinnati the Cincinnati, Hamilton & Dayton Railroad Company was not accepting shipments for transportation from Cincinnati to Dayton, and this fact was made known to the defendant's agent at New Orleans after the shipment had left New Orleans, and before it reached Cincinnati, and notice of such fact was given to the shipper at New Orleans, one J. P. Simone.

The defendant says that when said shipment reached Cincinnati, there was no road by which it could be forwarded to Dayton except that of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and that said shipment was forwarded to Dayton over said road, and due notice given to the consignee upon the arrival of said shipment at Dayton.

The defendant further says that Section 3 of the conditions forming a part of said bill of lading under which the shipment was carried provides, among other things, as follows:

“Every carrier shall have the right, in case of physical necessity, to forward said property by any railroad or any route between the points of shipment and the point of destination; but if such diversion shall be from a rail to a water route, there the liability of the carrier shall be the same as though the entire carriage were by rail.”

Defendant says that it was a case of physical necessity to forward said shipment over the line of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to Dayton.

To this answer the plaintiff did not file a reply.

Section 11329 of the code provides:

“Except averments as to value, or the amount of damage, for the purposes of an action, every material allegation of a peti-

tion, not controverted by an answer, and every material allegation of new matter in an answer not controverted by a reply, shall be taken as true."

Therefore, in view of the answer in this case, it is admitted that the Cincinnati, Hamilton & Dayton Railroad Company was not receiving freight between Cincinnati and Dayton, at the time of the arrival of this car; that it was a physical necessity to divert the car to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and that due notice was given of its arrival.

There was no notice given to the defendant of the location of the wholesale produce market in Dayton, Ohio. There was no direction that the car was to be delivered at the wholesale produce market in Dayton, Ohio.

Another question that presents itself is that this car arrived within a few hours of the time it was expected; the plaintiff had notice of its arrival Saturday forenoon, and the car was allowed to remain some place in the Big Four yards from Saturday until Wednesday, with but a part of the hampers of beans being unloaded.

It was the duty of the plaintiff to have used his best efforts to minimize the damage, and any expense or trouble that he was put to would have been a proper charge against the defendant. But nothing of that sort appears in the case.

Therefore, in view of the further fact that a jury was waived in this case, and the question submitted to the court, the judgment of the court is that the defendant go hence without day and recover from the plaintiff its costs herein expended.

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FINANCIAL INTEREST OF MAYOR IN STREET RAILWAY.

Common Pleas Court of Cuyahoga County.

CLEVELAND ELECTRIC RAILWAY V. CITY OF CLEVELAND.*

Decided, December 7, 1916.

Municipal Corporations—Street Railway Grant Rendered Invalid by Financial Interest of Mayor—Collateral Attack on Grant to Street Railway.

1. Where the mayor of a city allows himself, from whatever motive, to become so identified with the building of a street railway that his pecuniary interests will be promoted by obtaining advantageous grants from the city for the company, such grants are corrupted and must be treated as void.
2. While as a general proposition corporate existence can be questioned only by the state and in a direct proceeding for that purpose, and where the validity of a contract made by the city is questioned in the interest of the public the attack must be made by those legally representing the public, nevertheless where such a contract is relied upon to justify interference with private property of one not a party to the contract, its invalidity may be asserted by the company, not for the undoing of the contract, but for protection of its private rights.

PHILLIPS, J.

Heard on demurrer and motion to strike out.

A demurrer to the petition in the case of the Cleveland Electric Railway Company against the city of Cleveland and others, No. 99073, and a motion to strike out parts of the second amended petition in the case of like title, No. 98522, present for determination the legal effects of certain grants from the city to the defendant, the Forest City Railway Company.

Two principal questions concerning the contracts resulting from said ordinances and their acceptance by the company were presented in argument:

*Action dismissed without record at plaintiff's costs.

First, conceding the truth of what is properly alleged as to the personal and financial interest of Mayor Johnson in said railway company, are said contracts thereby invalidated?

Second, conceding that said contracts are so invalidated, can such invalidity be asserted by his plaintiff for the protection of its private property rights from interference by the Forest City Company, threatened under claim of right of interference given it by the city in and by such invalidated contracts?

While the property rights of the plaintiff are not very artfully stated in one of the petitions, I think it fairly appears that plaintiff owns and operates a system of electric street railways in numerous streets of the city, and that it maintains its tracks and their accessories by virtue of grants from, and contracts with, the city.

Stated compendiously, the petition alleges, and the demurrer admits, that the defendant railway company, in the construction of a like system of railways, threatens to interfere with plaintiff's track in some of the streets, and to make a joint use thereof with the plaintiff; that it justifies such interference with, and such joint use of, plaintiff's property by virtue of certain enabling ordinances of the city; that the mayor of the city, having a personal financial interest in the defendant company, procured the passage of such ordinances, and in divers ways promoted the interests of the defendant company, and that the defendants all the while knew of his personal financial interests in the company, and of his personal and official efforts to promote its undertaking.

The ordinances relied upon by the defendant railway company, are, briefly, as follows: September 9, 1903, an ordinance granting to Albert E. Green the right to construct, maintain and operate a street railway in Denison avenue. This ordinance was accepted by Green, and by him assigned to the Forest City Company; December 21, an ordinance was passed granting an extension to said Green, and right to the joint use of some of plaintiff's tracks, and fixing the compensation to be paid, in case of disagreement. This was accepted by Green, and there-

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after assigned to the Forest City Company; September 4, 1906, an ordinance granting an extension to the Forest City Company, and right to the joint use of certain of plaintiff's tracks, wires, poles and so forth. This was accepted by the Forest City Company; September 24, 1906, two like ordinances were passed and accepted by the company.

It is alleged in case No. 99073, that shortly after his election Mayor Johnson undertook to obtain from the city franchises for a street railway, and that pursuant to such purpose, he procured said Green to make application for a franchise in Denison avenue; that the establishing ordinance was passed by his procurement; that he procured Green to apply for the extension of December 21, 1903; that by his procurement said extension ordinance was passed by the council; that he procured the incorporation and organization of the Forest City Railway Company, and caused and procured Green to assign his said rights to that said company; that by Johnson's procurement, the extension ordinance of September 4, 1906, was passed; that by his procurement, and in furtherance of his general purpose of promoting said street railway, the ordinances of September 24, 1906, were passed.

In the second amended petition, in the other case, it is alleged that Johnson entered into a conspiracy with sundry other persons to obtain from the city said franchise for a street railway, in which grants, so to be procured, he was to be financially interested.

These charges of the personal and financial interest of the mayor in the railway company with which the city was contracting, and the knowledge thereof by the company being admitted by the demurrer, let us see what is the legal effect of such state of facts.

In the whole realm of jurisprudence no principle is better established or rests on firmer foundation, than the one which forbids one occupying a fiduciary relation from placing himself in any degree in antagonism to his trust. Agents, guardians, executors, directors of corporations, officers of municipalities, and all other persons clothed with the fiduciary character, are subject to this rule.

And this rule is accentuated in its application to the officers and agents of municipal corporations. The reason and propriety for accentuating this rule in its application to public officers are at once plain and strong. A public officer is one to whom is delegated some of the foreign functions of government, to be exercised by him for the public benefit. He acts only for the public; and the public are represented, in the instance, only by him; and the theory upon which his acts bind the public, is that his acts have the public sanction, because they are exclusively in the interest of the public. When the public officer acts, in any measure, for his own interests, and, hence, in the same measure against the public interest the public sanction is wanting, and the public may not be bound. A reason for accenuating the rule in its application to officers of a municipal corporation, is thus stated by the Canadian Court of Chancery.

I read from 4 Grant, 507, a single paragraph:

“If this rule be one of pressing necessity in cases of ordinary trust; why is it to be abrogated where the trusts are of such vast magnitude and importance? Why is the principle to be held inapplicable when the probabilities of an abuse of trust are so greatly multiplied? Such a determination in a country, the local concerns of which are managed to so large an extent by corporations of this sort, possessed of such extensive powers, would be productive, in my opinion, of the worst consequences to the moral and material interests, of the community.”

I read the statement of the general doctrine from 1 *Dillon, Munic Corp.*, Section 444:

“It is a well established and salutary rule in equity that he who is entrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based upon principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man can not serve two masters, and is recognized and enforced wherever a well regulated system of jurisprudence prevails. One who has power, owing to the frailty of human nature, will be too readily seized

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with the inclination to use the opportunity for securing his own interest at the expense of that for which he is entrusted. It has therefore been said that the wise policy of the law has put the sting of disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation. This conflict of interest is the rock, for shunning which the disability under consideration has obtained its force, by making that person who has the one part entrusted to him incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust. The law will in no case permit persons who have undertaken a character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others. The application of the rule may, in some instances, appear to bear hard upon individuals who had committed no moral wrong; but is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity, and to apply it to every case which justly falls within its principles. The principle generally applicable to all officers and directors of a corporation is that they can not enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit personally from such contract. To deny the application of the rule to municipal bodies, would, in the opinion of the Canadian Chancery Court, be to deprive it of much of its value; for the well working of the municipal system, through which a large portion of the affairs of the country are administered, must depend very much upon the freedom from abuse with which they are conducted. It is obvious that nothing can more tend to correct the tendency to abuse than to make abuses unprofitable to those who engage in them, and to have them stamped as abuses in courts of justice. The tendency to abuse may indeed be in part corrected by public opinion; but public opinion itself is acted upon by the mode in which courts deal with such abuses as are brought within their cognizance. It has been well observed that the view taken by courts of equity with respect to morality of conduct among all parties is one of the highest morality; and this can not fail to have a salutary effect on public opinion itself. Just as, on the other hand, if a low standard of morality were presented by the courts, its inevitable tendency would be the demoralization of the public feeling in regard to transaction of a questionable character."

Mechem, Pub. Off., Sections 368, 369, says:

“Any contract * * * which naturally and legitimately tends to induce a public officer to neglect, ignore, violate or exceed his official duty, or to make him less zealous, earnest or diligent in its discharge, * * * is contrary to public policy and void. * * *

“Any contract by which a public officer imposes restraints or creates obstructions to the future impartial and untrammelled discharge of his duty, are void.”

I read an excerpt from *People v. Overysse*, 11 Mich., 222, 226:

“All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And, a greater necessity exists than in private life for removing from them every inducement to abuse the trust imposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less. A judge can not hear and decide his own case, or one in which he is personally interested. He may decide it conscientiously and in accordance with law. But that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself.
* * *

“We think it no exception to the rule we have stated, that all the contractors were not members of the board of freeholders, or that those who were members were a minority of the board. The rule would not amount to much if it could be evaded in any such way. It might almost as well not exist, as to exist with such an exception. The public would reap little or no benefit from it.”

And again, on page 228:

“And, though these contractors may, as members of the board, have acted honestly, and solely with reference to the public interest, yet, if they have acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection. If, therefore, such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence, the only safe rule in such cases, is to treat the contract as void, without reference to

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the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support."

I have read from the opinion delivered by Judge Manning, of Michigan.

A brief extract from the opinion in the case of *Grand Island Gas Co. v. West*, 28 Neb., 852, 855.

"That an agent can not act in a double capacity is elementary. The fact that the principal is a municipal corporation, instead of a natural person, does not change the rule. The obligations and duties resting on a member of a city council are of such a character that he will not be allowed to reap any advantage his position may give—to speculate at the expense of the municipality. He must act solely for the welfare of the city. The temptation would be great to abuse the confidence reposed in him by the people if allowed to contract with it."

To the same effect is the language of the court in *Smith v. Albany*, 61 N. Y., 444, 445, which I will not take the time to read. And in *Findlay v. Parker*, 17 C. C., 294, a case decided by one of our circuit courts, of which Judge Price, later of the Supreme bench, was a member, and the opinion is this:

"When a municipality is allowed to embark in a business enterprise such as operating a plant to furnish its inhabitants with light and fuel, and to carry on the business of buying and selling gas where of necessity the conduct and management and control of the business is in the hands of those who are not personally interested in the assets of the business, who take no part in its savings, who pay no part of its liabilities; who are strangers to its profits, and not directly affected by its expense, the necessity of every safeguard is most apparent. Those who conduct the business and control it may not directly or indirectly both buy for it and sell to it either material or labor, and this however honest and competent may be the one who thus serves it. And an officer of a municipal corporation who has retired from the office to which he has been selected or appointed, may not be interested, either directly or indirectly, in any work or service for said corporation, until the expiration of one year after his retirement from office."

This is by virtue of a statutory provision.

“He may not direct or control its future policies while in office, and then upon retirement stand ready to acquire as an individual the harvest which he has hoarded as a public officer, and this however honest he may be, and however competent.”

In few cases decided by our Supreme Court, this doctrine has been fully recognized. Justice Storey has said:

“It is by no means necessary in cases of this sort, that the agent should make any advantage by the bargain. Whether he has or not, the bargain is without any obligation to bind the principal.”

The rule I have been considering is so familiar to the profession as not to need the citation of authorities for its existence, but I have cited these authorities, and others could be cited *ad infinitum*, to show how firm its foundation, how broad its scope, the tendency of the courts to widen rather than to narrow its application, and the care with which the courts have guarded the rule from innovation, exception, or modification.

As a conclusion upon this branch of the case, I must find that the relation which Mayor Johnson sustained towards the city and towards the street railway enterprise were in direct antagonism. As mayor of the city, he was officially a party to the several contracts with the railway company, and fidelity to the city forbade his being personally interested, directly or indirectly, in the welfare of the company, in the obtaining of privileges from the city.

That he was so interested the facts here admitted can leave no doubt. He conceived, initiated and promoted the whole scheme of building and operating a system of three-cent fare railways in this city. He procured a Mr. Green to make application for a grant from the council. He procured the council to make two successive grants to Green. He procured the incorporation and organization of the Forest City Railway Company, and then procured Green to assign his rights to that company. He procured the council to make further grants to that company. He

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assumed secondary liabilities for payment for rails, cars and other equipments for the road. He assumed liabilities as to paving, etc., in order to obtain consents of property owners. He was active in securing consents, and but for his activity in that regard, enough consents would not have been procured. He procured the incorporation and organization of the Municipal Traction Company, to which the road has been leased. Mr. Johnson, together with one E. W. Scripps, entered into an agreement in writing, whereby they obligated themselves to subscribers to the stock of the Forest City Railway Company to indemnify them against loss on their stock. By this intemnity undertaking, Johnson and Scripps bound themselves to purchase from the subscribers their stock within a fixed period, at the option of the stock subscribers, and to fully protect them from loss; and in pursuance of said agreement and undertaking, many thousands of dollars of the stock have been sold, thus fixing additional liability of Johnson and Scripps if that undertaking is legally valid.

There are averments in these petitions, that Mayor Johnson is financially interested in this enterprise which he has fostered, but lest these may not be well pleaded, I have placed no reliance upon them.

While the mayor's zeal and activity in securing additional and cheaper transit for our people should be commended rather than condemned, when he allows himself, from whatever motive, to become so identified with the enterprise that his pecuniary interests will be promoted by obtaining advantageous grants from the city for the company, such contracts are corrupted and invalidated, and are void. When, in promoting and in financing the company, Mayor Johnson assumed liabilities that were contingent upon the financial success of the company, he had a personal interest in its success. It was indispensable to the success of the company that it should obtain extensions of its lines on terms favorable to the company. In this regard Mr. Johnson's personal interest was identified with it, and this placed him in direct antagonism to the interests of the city, which it was his official duty to protect and promote. The statute provides

that no street railway, or extension thereof, can be constructed within a municipality, unless the right to do so be first granted by the municipal corporation, and by ordinance. The council is to prescribe, by ordinance, the terms and conditions upon which, and the manner in which, the road shall be constructed and operated, and the council is to designate by ordinance the streets to be occupied and used. Notice must be published, bids must be invited, with fair chance for competition; consents of property owners must be had; paving and repair of streets may be required of the company; the rate of fare is to be fixed, etc., and the statute repeatedly says that in the consideration and disposition of these matters the officials shall have in view "the benefit, convenience and advantage of the public."

In these matters the council is required to act by ordinance, and these ordinances must be presented to the mayor, and must have his approval before they can go into effect.

When a right is to be granted to construct or to extend street railway, the council is confronted with considerations of much concern to the people and the municipality. Street railways are at once a convenience and an inconvenience, and they are a source of danger. Perhaps nothing of greater concern to the people and to the municipality ever engages the consideration of the council; and the same weighty problems confront the mayor when the ordinances come before him for approval.

In the consideration of such questions, these officials, clothed with such powers, and charged with such duties, should be free from improper impulses, or restraint, or embarrassment. In the language of our Supreme Court, "The public, for whom they act, have the right to their best judgment, after free and full discussion and consultation upon the public matters entrusted to them." *McCortle v. Bates*, 29 Ohio St., 419, 422.

Can this right of the public, can the public welfare, be conserved if these officials, one or all of them, are interested in the financial welfare of the railway company with which they are dealing? To make the matter clear, let us intensify the situation: Suppose the mayor and all the councilmen should organ-

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ize and own a street railway company; suppose that they should own all its stock and that from their number were chosen all of its directors and other officials and agents; and suppose that these persons, in their capacities as city officials, should make a contract with themselves in their capacities of street railway officials, granting to such company railway rights in some of the municipal highways; would any one doubt the utter invalidity of such grant? Could any legal effect attach to the action of city officials where there is such clear antagonism of interest and of duty? Could such railway company have the ear of the chancellor for a moment in respect of alleged rights so obtained? And why not? The contract so made by such persons, *inter se*, might be entirely fair—might even be advantageous to the city; and I suppose that, strictly speaking, such grant by the city officials would be *intra vires*. Its invalidity would not come from want of corporate capacity—it would come from the virus of corruption and fraud, from dereliction of official duty, from bad faith in a trust relation; from antagonism of personal interest and fidelity to the public interest. Such transaction would contravene public policy, which Greenhood, Public Policy, says is a principle of the law which “Secures the people against the corruption of justice or the public service, and places itself as a barrier before all devices to disregard public convenience.”

In the case I have supposed, if only one, or a part, of the city officials was identified with the railway company, the difference would be one of degree, and not of principle.

I come now to the second of the two principal questions presented in argument, that is, can the invalidity of the contract be asserted by this plaintiff for the protection of its private property rights from interference by the Forest Company under claim of right of interference given it by the city, in and by such invalid contract?

While in the argument this action was treated as a direct and affirmative attack upon certain ordinances and the contracts resulting from an acceptance thereof, and nearly all the authorities cited in support of the demurrer, were to the point

that these ordinances and these contracts, like questions as to corporate existence, are immune from attack at the suit of an individual for the conservation of private right, I think that is not the character of this action, as will appear by some careful attention to some well known rule of procedure.

All of this petition that relates to the grounds upon which the defendant railway company claims right to joint use of plaintiff's road, and all that relates to this invalidity of such claim, is improperly in the petition. These allegations do not make for the plaintiff in the first instance. All that is requisite, and all that may properly be alleged in the petition, is a concise statement of the plaintiff's property right, and the defendants' threatened interference therewith, and that such proposed interference is without legal right or authority. The ordinances conferring rights upon the defendant make for the defendant, and should be pleaded by it in justification; and the facts, alleged to show the invalidity of these grants, are proper matter for reply to such answer, and should be so pleaded by plaintiff in avoidance. Under the old system of pleading in equity these allegations would be proper in the charging part of the plaintiff's bill, which supplied the office of a reply under our reformed procedure. The charging part of the old bill in equity alleged the pretenses which the plaintiff supposed the defendant would set up as a defense, and then charged other matter to disprove or avoid them. Under the reformed procedure this is anticipating and avoiding a defense, and is not allowable.

In one of these cases, No. 98522, there is a motion to strike out a part of this matter. This motion does not state for what reason, or on what ground, the matter sought to be stricken out, is objected to. I suppose that is a mere slip of the counsel; but assuming it to rest upon the statutory ground of redundancy and irrelevancy, I should say it is well taken, and should be granted, unless for one reason, now to be stated: This motion does not attack the allegations of purely defensive fact, but seeks to have only the facts in avoidance thereof stricken out, leaving the defensive allegations standing. This would emasculate

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late the petition, and would put the plaintiff at an unfair disadvantage.

The matter I think is improperly in the petition is the statement of the various ordinances under which the defendant claims the right of interference, and such statement of those ordinances shows such right—standing alone—shows such right in the defendant. Then there are added sundry allegations of fact to show the invalidity of such ordinances, because of the financial interest of the mayor in the company, to whom the grants were made; that that part of the petition is an avoidance of the facts under which the defendant is alleged to claim the right of interference. Well, now, this motion to strike out attacks only this matter in avoidance, only these allegations of financial interest. Were they stricken out, and the allegations concerning the ordinances and their acceptance left standing in the petition, the petition would then show a clear right in the defendant to make the interference thus threatened. All of this matter is improperly in the petition, and all might go out if included in a motion.

So long as the purely defensive allegations remain in the petition, and remain there with the concurrence of the defendant, the allegations in avoidance thereof should remain with them. It is clear that all these allegations were inserted in the petition only to make available the facts alleged in avoidance; and that the facts defensive in their nature were pleaded only to make way for the matters in avoidance—as a sort of inducement thereto. It is now sought to dissever these groups of dislocated allegations, not to relieve the record, or to purify the pleadings, but to obtain advantage by striking out the one group, and leaving the other, which is equally vulnerable.

I am inclined to refuse this motion rather than to allow it to serve a purpose not intended by motions to strike out improper averments. So long as the purely defensive averments remain in the petition, and remain there with the concurrence of the defendants, I think the matter asked to be stricken out should remain; because this motion is relevant to the defensive

matter in the petition. So long as the defensive matter remains, this matter in avoidance thereof is material to a statement of the plaintiff's right of action, as they undertake to state it, so for that reason, this motion will be refused. If the motion embraced all of this matter, the matter that is purely defensive, as well as the matter in avoidance thereof, I think it is clear that the motion should be granted, although I gave them leave to amend this petition, and insert this matter in it. It was done without consideration of it, and done at the suggestion of counsel, that unless this distinct right of action based upon the mayor's financial interest were embraced in that case, that that case should go to judgment without the matter embodied in it, it might be an adjudication of other rights so omitted from it, and upon that suggestion, and without consideration, and I believe with very little objection, if any, leave was given to amend the petition and bring that matter into it. I am satisfied that on the consideration of it, it was improperly in it. It belongs to the case, but not in the petition. Part of it should be in answer and part of it in reply.

In the other case, No. 99073, there is a special and a general demurrer to the petition. Inasmuch as the defendants have not, in this case, questioned the propriety of any averments of the petition, but have challenged their sufficiency, admitting for the occasion, that they are true, I have treated them as properly in the petition, and have considered only the questions of their legal operation and effect.

It was urged in argument that corporate existence can not be attacked collaterally—that a private party, suing or defending in his own interest, can not question the sufficiency of proceedings to incorporate. It is true, as a general proposition, that corporate existence can be questioned only by the state, and only in a direct proceeding for that purpose. Whether a certain association of persons, have been invested with certain privileges by the state, or, if so invested, whether they have forfeited the right to exercise such privileges, are questions that concern the state, and not individuals—it is a public question.

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It is likewise true that when the validity of a contract made by the city is questioned, in the interest of the public, the attack must be made by those legally representing the public—such attack can not be made by a private party, suing or defending in his own private right.

But here the analogy ends. When such contract is relied upon to justify interference with the private property of one not a party to the contract, its invalidity may be asserted, not for the undoing of the contract, which is a matter of public concern, but for the protection of the private right, specially affected thereby.

The irregular way in which the question as to the validity and sufficiency of the defendant's alleged authority is presented by the pleadings, gives an appearance of attack upon the ordinances, at the outset of the action, and as the primary purpose of the suit. This is not the real situation. If this claim of invalidity were presented by pleadings in strict conformity to the logic of procedure, and the rules of pleading, as I have before shown these to be, it would then be plain that the object of the suit is the protection of property rights, and that the claim of invalidity of contract is a challenge of the validity and force of an asserted justification of proposed interference.

If this petition stopped with a statement of the plaintiff's right, and the defendants threatened wrongful interference, and if the defendant railway company were here justifying by showing a contract in terms authorizing such interference, but admitting that it was the fruit of corruption and fraud on its part, would it be claimed that it could have the ear of the chancellor? It must be remembered that it is not the corruption of a city official alone that is asserted here, but that of the defendant railway company as well; for it is alleged in the petition, and admitted by the demurrer, that the defendant had all the while full knowledge of the mayor's financial interest in that company.

It was the burden of the arguments in support of the demurrer, that the right of the Forest City Company to exercise

its franchise acquired from the city is not subject to collateral attack at the suit of a private party. I think I am in full accord with this proposition. It is held by the circuit court of this circuit, in *State v. Railway*, 6 C. C., 318, that a grant by a municipality to a company to construct and operate a railway in the streets is a franchise, emanating from the sovereign power, and the same is held by other courts. One case is *Denver & S. Ry. v. Railway*, 2 Colo., 673. I have noticed a similar holding in other cases that I have not noted. It is a sound doctrine recognized in Ohio and generally, that the grant of such right to use the streets of a municipality, is a franchise; that is, it is a privilege that comes from the state through the instrumentality of the city, and therefore, it is as immune as any other franchise emanating from the state.

The general proposition that a franchise—a special privilege and power conferred by the state, is immune from collateral attack, is shown by such array of authorities cited by demurrants, and is so well settled that I need not dwell upon it or refer to the authorities.

If I have reasoned rightly as to the nature of these actions, and, as to the construction of these petitions, these actions are not, in the first instance, an attack upon the franchise rights of the Forest City Railway Company. The attack upon the franchise right claimed by the defendant is not in support of plaintiff's asserted property right, but is purely and only in refutation of defendant's asserted right of interference with plaintiff's property. The statement of plaintiff's property right needs not to be forfeited by setting out some supposed ground of interference therewith relied on by defendant, and then showing the invalidity of such supposed ground of interference. The plaintiff's right is not at all fortified in such way. But the defendants, by demurring to this over full petition, this *omnium gatherum*, if I may so characterize it—virtually say: "For the purposes of this demurrer we are satisfied with your statement of your primary right, and with your statement of our ground of justification; but we challenge the legal sufficiency of the

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facts stated by you in refutation and avoidance of our justification." And this is the only question that has been argued; and the decision of this one question decides the case. Since the defendants have chosen to treat the petition in this way—the court has so treated it. It must be an incontrovertible proposition—I know it is one that the courts have gone great lengths to maintain—that courts will not lend their aid to a claim or a defense that has its inception and its fulfillment in corruption or fraud.

If I am right in holding that the facts alleged in the petition show official corruption, and this participated in by the defendant railway company, then it seems to me the attitude of the defendant is this:

"We admit plaintiff's primary right; we admit our intended interference with that right; and we justify by a show of authority corruptly granted, and as corruptly received—authority obtained in a transaction that was conceived and consummated in official corruption, and we were parties to the corruption; but here are some technical forms of procedure, some legal formalities, that make this corrupt transaction immune."

And this in a court of equity, whose conspicuous function is to look beyond the form and into the substance of the transaction.

It was suggested in argument that inasmuch as the city had the corporate power and the legal right to grant the privileges in question, *ergo*, the grant is immune and valid. If this were the law, then all the legitimate powers of the municipality might be exercised corruptly, and all its acts be valid, though all corrupt. The suggestion in argument loses sight of the trust relation involved. The power of the city to make such grant, is a delegated power, and is held in trust. The city officials are the constituted agencies for the performance of its trust obligations. When they are recreant to the trust, and deal with the party who is cognizant thereof, and is therefore *particeps criminis*, nobody is bound, and the transaction is a nullity.

In the case in the Supreme Court of Maine, where a tender of merchandise in performance of a contract was relied on, but

the property tendered did not conform to the requirements of the law to render it merchantable, the court said:

“He could not plead a performance which involved a palpable violation of the law.”

It seems to me that this is the attitude of the defendant in this case. That the plaintiff owns its tracks, and has a property right in that part of the streets which is actually occupied by its tracks, and that the rights will be protected by injunction, are propositions that are settled by our Supreme Court, by a decision in *Hamilton, G. & C. Trac. Co. v. Transit Co.*, 69 Ohio St., 402. This shows that the primary right asserted by the plaintiff will, in proper action, be protected from wrongful invasion.

That the plaintiff would suffer special inconvenience and injury not common to the public, from the threatened interference with the private property right, and that the threatened injury is in terms authorized by the grants herein held to be invalid and void, are propositions so obvious as not to require any discussion. This shows that the threatened interference is wrongful in the sense that it is unlawful.

This petition, stating a legal primary right in the plaintiff, and threatened wrongful invasion thereof by the defendant railway company, it does state a right of action in this plaintiff, and against the defendant railway company.

But it is claimed that this plaintiff can not sue this defendant for the protection of the plaintiff's right from the defendant's wrongful invasion thereof. Bearing in mind that such right may be protected by injunction, who, let me ask, should bring an action—who should invoke the action of the court but the party whose right is threatened, and who is entitled to protection? And who, may I inquire, should be sued but the party threatening the wrong, and whom it is sought to bring within the operation of the court's order, if one is to be made in the case?

In response to this, it may well be suggested that since the alleged delict is an act authorized by a franchise conferred by the state, through the city, it must further be made to appear

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that the validity of such authority may be assailed in this indirect way.

In answer to such suggestion, I have already shown, I think, that where such franchise is obtained corruptly, it binds nobody and empowers nobody, and is not immune from attack whenever and however asserted.

If, however, I am wrong in holding a franchise so obtained to be thus vulnerable, our Supreme Court has announced a doctrine that clearly sanctions the kind and extent of attack sought to be made in this case. I refer to *Zanesville v. Gas-Light Co.*, 47 Ohio St., 1; *Gas-Light Co. v. Zanesville*, 47 Ohio St., 35. These two cases were brought and tried and determined while I lived at Zanesville, and I am quite familiar with them. Indeed, one of them came before me after I went upon the bench. There was a controversy between the gas company and the city as to which should fix the price of gas furnished to and consumed by the city. The company claimed that it had the right under its charter to fix the prices within certain limits. The city claimed that it had the power under its charter, under statutes that were binding upon the company, to fix the price, and it did fix the price. The city refused to pay the price required by the company, and the company refused to furnish gas at the price fixed by the city, and there was some violence used in regard to the posts of the lighting company, and some pipes were cut, and it resulted in the bringing on the same day of an action by the city to restrain the company from withholding its gas, and interfering with its own pipes for that purpose, and an action by the company to restrain the city from using the gas unless it agreed to pay the price fixed by the company. The cases both went to the Supreme Court. The second paragraph of the syllabus in the first case, I should say that there was involved in the contention the question of corporate power, either in the city, or perhaps, in the company, perhaps in both, I don't now recall it—the second paragraph of the syllabus in this case is this:

“Whenever an incorporated company, in any action, asserts a right against another person, based upon an assumed fran-

chise or power, the person against whom the right is so asserted, may, as a defense, deny the existence of such franchise or power.”

And on page 29, Minshall, Chief Justice, uses this language:

“It is open, at all times, to the person against whom a corporation may claim the right to exercise a power to call the power in question, and to require the company to show the existence of the power, by deriving it either from the plain terms of its charter or the statute under which it is organized. Such a determination is an adjudication upon the question as between the parties to the suit, but does not operate as a judgment of ouster. It may still claim and exercise the right as to other persons, as if such judgment had never been rendered. Not so as to judgment of ouster in *quo warranto*. In such case, the proceeding being at the suit of the state, the judgment is available to all persons as an adjudication upon the question.”

The case of *The Lehigh Coal & Navigation Co. v. Railway*, 167 Pa. St., 75, was a bill in equity to restrain the construction of an electric railway on a public road between two boroughs. The defendant claimed the right to use the public highway through Rahn township, by virtue of a consent obtained from the proper official, one Coll, the supervisor of the township. The defendant had procured this consent by agreeing with Coll that it would give him and his son employment so long as the father should live. He was the proper officer to give the consent to occupy the highway through the township, and the consent had been procured, and in the way that I have just stated.

The plaintiff was under contract with the township authorities to keep the roads of the township in repair and in safe condition. There was a statute authorizing the township authorities to let by contract the maintenance of the public roads within the township, and this plaintiff had such contract. The trial judge dismissed the bill on the ground that the decree prayed for would prevent the construction of the road—that is the street railroad—and would practically be a repeal

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of the defendant's charter. In the Supreme Court this view was urged by the defendant, and it also claimed that the status of the plaintiff gave it no right to maintain such action. The plaintiff claimed that the arrangements between the defendant and Coll was bribery, and rendered his official act inoperative, and that the defendant, in the attempt to use the public highway in the construction of its road, was a trespasser. The Supreme Court reversed the judgment of the lower court, and ordered an entry of a perpetual injunction. As to the claim that an injunction would practically work a repeal of the company's charter, the court said that such would not be its effect, but that the operation of such order would be to limit its action to what was authorized by its charter. The court concluded its consideration of this claim with the pungent suggestion that, "The trouble such companies encounter grows out of the circumstances that they consult their chartered rights less than their pecuniary interests.

As to the claim that the consent obtained from the township supervisor was inoperative, the court said:

"This agreement was not between the township and the railway company, but between Coll as an individual and the company, by which the company undertook to pay the individual for his action as an officer. The plain import of the agreement was this: if the supervisor of Rahn township would give consent on behalf of the township to the occupancy of its public roads by the defendant street railway, then the company would pay the man who held the office the price he demanded for his official action. The privilege bargained for came from the township. The price of the privilege went to the man who held the office and enabled him to control the privilege * * * this was a very plain case of bribing a public officer. A consent so obtained, if otherwise valid, would confer no rights on those who bought it. The contract which was given for it was as utterly worthless as the consent. Neither the buyer nor the seller took anything by their bargain, nor did the township, against which both seller and buyer were contriving, lose anything by the transaction. Its consent has not been given, and can not be obtained in the way in which the paper, called a 'consent' in this case, was secured."

As to the claim that the status of the plaintiff company did not authorize it to sue, the court said:

“A corporation which has assumed the duty of making and repairing highways, under the provisions of the act of June 12, 1893, P. L., 451, has a standing in a court of equity to object to the construction of an electric railway upon one of the highways it is bound to keep in repair.”

The synopsis of the brief of counsel in that case shows that the argument of counsel for the defendant brought the court for its consideration several of the points that are here urged and chiefly relied upon.

The doctrine of this decision was plainly this:

First, an electric railway may rightfully be constructed in a public highway only when the proper legal custodians of the highway have properly and legally consented to such use of the highway.

Second, when such consent has been obtained by corrupt means, it authorizes nobody, and it binds nobody.

Third, when a pretended consent is a nullity, there is no consent, and one whose contract rights are to be affected by a threatened unauthorized construction and use, may maintain an action for the protection of his rights by injunction.

There is striking similarity between this Pennsylvania case and the case in hand. The plaintiff company sued in its private right, and not as representing the public. The plaintiff's right grew out of contract. The right asserted by the defendant company was a franchise right, and was obtained and held under color of authority; and the ground of attack was corruption in a public official. And the case stands well within the rule laid down by our Supreme Court, *Zanesville v. Gas-Light Co.*, *supra*, in that the plaintiff was resisting and challenging the right of a corporation to exercise an apparent and colorable corporate power.

Another view of this case has occurred to me, in the consideration of the case. It is this: It must be assumed that the plaintiff has its property in the streets by virtue of a contract

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with the city. It may also be assumed that this contract is for a specified term, not yet expired. Such contract is binding upon the city, as well as upon the plaintiff, until it has been fully performed, at the expiration of its term. Whatever right the city may have, by law or by the terms of its contract to encumber the plaintiff's tracks, there must be, at least by implication, an obligation—a contractual obligation—not to encumber them by corruptly procuring and empowering another to make joint use of them. For while this defendant company has been created, and grants thereto have been made, by the procurement of the mayor, urged thereto by his personal financial interest in the enterprise, *non constat* that such grants would have been made without such wrongful procurement.

Is not this such breach of contractual obligation as gives the plaintiff a right to maintain this preventive action?

I had in mind, what I have not very well expressed by what I have said, that there must be good faith on the part of the city in carrying out this contract with the plaintiff company. That whatever right or power the city has to encumber the plaintiff's tracks, and this power and right with or without contract, must be exercised in good faith. That must be an implication of the relation between them. And now, when it is conceded under the construction that must be put upon things here, that here is a corrupt and fraudulent imposition upon the plaintiff's tracks, it is a breach of the good faith that rests upon the city in carrying out that contract while it is in existence. And that, it seems to me, would give a right of action against the city and against the defendant railway company that is now proposing to interfere with the plaintiff's tracks under the license of grant from the city. That occurred to me, and I suggest it.

Another view that occurred to me: I think there is no allegation in either of these petitions, that there is no contract right in the city as against this plaintiff to grant to another company a joint use of its tracks. I have not examined this petition with a view to that matter, but I have read them

several times for other purposes. My recollection is that there is no such averment in them. That matter came up in the hearing that was had in one of these cases on the motion for a temporary order, that was brought into the case by evidence.

Now, then, in the absence of any contract right on the part of the city to impose this burden upon the plaintiff's track, it would still be within the province of the city to grant the privilege of using those tracks, so far as it concerns the public highway, but before the right to make such actual use of the track would accrue to the defendant company, the right as against the plaintiff company would have to be obtained by appropriation. There is no full right of actual occupancy, joint occupancy, of the tracks, until there has been, in addition to the consent of the city, an appropriation, or until something had been done under contract, which is equivalent to an appropriation. And now, isn't the plaintiff company entitled to an injunction to restrain actual interference and occupancy until there has been an appropriation, no contract right of the kind I speak, appearing in the petition? If that be so, then this demurrer should be overruled on that ground.

The motion to strike out, as I said, will be overruled. The demurrer to the petition in the other case will be overruled.

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**PROMISSORY NOTE RECEIVED FOR PRE-EXISTING DEBT IS
TAKEN IN DUE COURSE AND FOR VALUE.**

Common Pleas Court of Hamilton County.

W. B. WUESTEFELD v. BEN C. ALBERT.

Decided, January 20, 1916.

*Bills, Notes and Checks—Note Received in Due Course and for Value—
Where Taken in Payment of a Debt—New Note Taken in Part Pay-
ment for One Which Had Become Due.*

1. Where a note is received in payment of a pre-existing debt due from the signer of the note, he parts with nothing and the note is taken in due course and for value.
2. The holder of a note, which he surrenders for part payment in cash with the balance evidenced by a new note, is a holder for value.

*Charles S. Bell and Frederick E. Niederhelman, for plaintiff
in error.*

M. Muller, contra.

NIPPERT, J.

Error to the Municipal Court of Cincinnati.

The defendant in error, Ben C. Albert, recovered a judgment of \$203.75, in the court below, against the plaintiff in error, W. B. Wuestefeld, who now prosecutes error to this court.

Plaintiff below based his claim against the defendant below on a certain promissory note, of which the following is a true and correct copy:

“\$200.00

MAY 28th, 1914.

“Ninety days after date I promise to pay to the order of
H. Stern, Two Hundred Dollars.

“At the Peoples Bank & Savings Company. Value Received.

“W. B. WUESTEFELD.

“Endorsements:

“H. STERN,

“BEN C. ALBERT.”

The said note was protested for non-payment and plaintiff paid \$1.25 protest fees. Plaintiff claimed that he was the *bona fide* holder for value, in due course, of said note and recovered judgment in the sum of \$203.75 and his costs.

The defendant below, in his answer, admitted that he signed the note and sued upon, but says that he signed said note for the accommodation of said H. Stern, and that he received no consideration whatsoever for signing said note; and denied that Albert is the owner and holder for value of the note sued on or that he took it in good faith for value and in due course of business; that the plaintiff took the note of said Stern and applied the same as a credit upon the account of the claim which Albert then had against Stern and which claim was then due and owing by said Stern to plaintiff, and that at the time Albert took said note he gave no value or consideration therefor.

The cause was submitted upon the pleadings and the evidence, and the court below, upon consideration thereof, found that there was due Ben C. Albert from W. B. Wuestefeld the sum of \$203.75, to all of which defendant below noted his exceptions, mainly on the ground that said judgment is contrary to law in as far as the court held that Albert received this \$200 note in due course of business and for value.

The trial of the cause in the court below developed the following facts, to-wit: Before the giving of the \$200 note involved herein, Stern had given Albert a note for \$300, which Albert applied upon Stern's account of about \$1,200; when this note matured Stern gave Albert \$100 in cash and a note of \$200, executed by Wuestefeld, in renewal of the \$300 note. This \$200 note was not paid at maturity and Albert thereupon sued Wuestefeld for the face of the note and recovered judgment, which is now before this court for review.

Where a party receives a note for a pre-existing debt due from the person who signs the note, he parts with nothing, for a conditional payment by note does not impair the right of the creditor to proceed upon the original indebtedness, and notes so taken are not taken in due course and for value. This ap-

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plies to the \$300 note which Albert received from Stern, endorsed by Wuestefeld. The law regards such payment, under such circumstances, as conditional only, and the right of the creditor, Albert, to proceed upon the original indebtedness after the maturity of the paper is unimpaired unless there is affirmative proof of the intention on part of Albert to receive the Stern-Wuestefeld paper in absolute discharge and satisfaction of the debt at the time of its receipt.

But we are not called upon to fix the respective rights of the parties to this action in as far as the first note of \$300 is concerned. Counsel for plaintiff in error would have a good defense if the suit had been brought upon the original \$300 note, for under the decisions of our courts no valuable consideration passed when Albert accepted Stern's first note, and the record shows that it was a conditional payment only.

The question raised in this case is as to the liability of Wuestefeld upon a \$200 note, which was given by Stern to Albert when the above-mentioned \$300 note matured. The record discloses the fact that upon the maturity of the \$300 note, Stern paid Albert \$100 cash and gave him the note executed by Wuestefeld for the balance, that is, \$200. The \$300 note was delivered to Stern and was sufficient consideration for the \$100 payment and the \$200 note. The consideration was the surrender of the original \$300 note.

In the case of *Van Norden Trust Co. v. Rosenberg*, 62 Misc., 285, the court held that the holder of a note for \$2,000, who surrendered it for a payment of \$500 cash and a new note for \$1,500 executed by the maker and endorsed by the defendant, was a holder for value.

In surrendering the old note, Albert parted with value, and the case is thus brought expressly within the terms of Section 8131, General Code:

"When value at any time has been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

Brannin, Neg. Instr., p. 35, supports this principle.

The fact that the \$200 note of Wuestefeld was discounted by Albert at the Peoples Bank does not strengthen the case of the defendant in error. The note became an instrument for value in the hands of Albert the moment he delivered the old note for \$300. It is admitted that Albert acted in good faith and without fraud and without notice that the note of Wuestefeld was an accommodation note, so that, the defendant in error having taken the note in good faith and for value must be considered a holder in due course and is entitled to recover.

The judgment below will therefore be affirmed.

SHORTAGE IN LAND CONVEYED.

Common Pleas Court of Hamilton County.

JOHN HAUCK BREWING CO. v. WILLIAM H. TAFT ET AL.

Decided, August 14, 1912.

Pleading—In an Action for Damages for Shortage of Land Conveyed Under a Deed of General Warranty—Facts Must be Stated Showing the Breach.

In an action for damages for shortage of land conveyed under a deed of general warranty by metes and bounds, the mere statement of the breach is not enough, but the fact or facts which show the breach must also be alleged.

Oscar Stoehr, for plaintiff,
George P. Stimson, contra.

DICKSON, J.

Demurrer.

The plaintiff states that some real estate was purchased by it in Cincinnati, Ohio, and describes the same by metes and bounds; that a deed of general warranty was delivered to it.

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The plaintiff complains that upon entering said real estate, it was found that there was not as much property there as was purchased, and as much as was warranted, and prays damages by reason of a breach in its warranty rights.

The defendant demurs because facts are not stated sufficient to sustain any cause of action, and claims in argument, that there can be no relief for plaintiff by way of the warranty until an eviction, or some state of facts equal thereto has occurred.

As against this the plaintiff in argument contends that since the doing away with the livery of seizin by the actual giving and taking of a token, or on actual view, it has a right to rely upon the description in the deed, and that when upon view or entry a shortage be discovered, such is equal to an eviction and damages lie.

While the court is disposed to agree with the plaintiff, yet so far as the facts stated are concerned the demurrer must be sustained, because no fact is stated as to why the plaintiff has not seen or can not enter upon all it bought.

If some fact equal to an eviction occur and be relied upon, certainly such must be stated. The mere statement of a breach is not enough. The fact which shows the breach must be stated, *i. e.*, the plaintiff must state why it can not enter on to what it bought; neither is the bald statement that the plaintiff owned property other and different than that described in the deed certain enough.

The demurrer will be sustained.

**ORTHODOX JEW MAY KEEP BARBER SHOP OPEN
ON SUNDAY.**

Common Pleas Court of Franklin County.

H. ROBINS V. STATE OF OHIO.

Decided, October 13, 1915.

Sunday Closing—Barber Shop May be Kept Open—Where the Proprietor Conscientiously Observes Saturday as a Holy Day.

While Section 13047, General Code, which prohibits barbering on Sunday, contains no exception in favor of persons who conscientiously observe the seventh day of the week as the Sabbath, it is in *pari materia* with the statutes against Sabbath desecration which contain such exception; it therefore follows that one who conscientiously observes as a holy day the period from sundown on Friday to sundown on Saturday, refraining from all work and keeping his shop closed during that time, may avail himself, in defense of prosecution under the statute against barbering on Sunday, of the exception prescribed for those observing the seventh day as the Sabbath.

Robert J. Beatty, for plaintiff in error.

Louis A. Alcott, contra.

RATHMELL, J.

On September 21, 1915, Robins was found guilty of violating the statute against barbering on Sunday. He was charged with engaging in the business of barbering on August 22, 1915, being Sunday. The case was submitted upon an agreed statement of facts. It is admitted that he was engaged in the business of barbering on the day alleged, and that he is an orthodox Jew who conscientiously observes the Sabbath as a holy day, from sundown Friday evening until sundown Saturday evening, and that during the Sabbath day, because of his religious belief, he refrains from all work, and on the Sabbath keeps his place of business closed, and does not engage in any business on that day.

1917.]

Robins v. State.

The prosecution is under Section 13047, General Code, which contains no exception in favor of persons who conscientiously observe the seventh day of the week as the Sabbath and abstain thereon from doing things prohibited on Sunday.

The question is whether such defense is available to plaintiff in error, otherwise challenging the constitutionality of the law.

In *Stanfeal v. State*, 78 Ohio St., 24, the Supreme Court had under consideration the law in question, Section 13047, General Code. The law was upheld. The question raised here was not directly involved in that case, but we think the point involved in this case was not overlooked in that case. The court in its opinion, p. 40, says:

“If anything is urged against the law because it does not except the rights of those who conscientiously observe the seventh day of the week as Sunday, it is suggested that Section 7033-1 (R. S.) is a part of the general legislative scheme to regulate the observance of Sunday, in which such exception is provided.”

This we conclude is a recognition by the Supreme Court that Section 13047, General Code, is *in pari materia* with Sections 13044 and 13045, General Code, of the Sunday law, where an exception in favor of those persons who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things therein prohibited on Sunday, is provided.

The rule appears well established that statutes *in pari materia* are to be construed together and as one act.

“Where there are earlier acts relating to the same subject the survey must extend to them; for all are for the purpose of construction considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs.” *Endlich, Interp. Stat.*, Section 43.

In *Roberts v. Briscoe*, 44 Ohio St., 596, 600, Sections 5240, 5241, 5242 and 5243, Revised Statutes, were considered *in pari materia*, and to be construed as one act.

For illustration of the application of the rule of construing statutes *in pari materia* though passed at different times, as one act, see *Perkins v. Perkins*, 62 Bost., 531; and *Neeld's Road*, 1 Pa. St., 353, 355.

We hold that Section 13047, General Code, is not in violation of the Constitution of Ohio and is *in pari materia* with Sections 13044 and 13045, General Code, and should be construed together; and that, being *in pari materia* the exception provided in Section 13045, General Code, avails the plaintiff in error, and that the defense urged by him was good, and the conviction was contrary to law and the evidence and should be reversed.

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Nature of the occupancy where a tenant continues in possession after the expiration of a written lease. 1.

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LEGACY—

To secure early payment of a legacy application must be made to the probate court and bond given as required in Section 10762. 184.

LIBEL AND SLANDER—

The publication by a "civic league," purporting to voluntarily furnish the public reliable information concerning candidates for public office, of the statement concerning a certain candidate for office that "His business and court record is such that in our opinion he is entirely disqualified for the Legislature. He should be defeated," is not libelous *per se*, and

in the absence of an averment of special damages following the publication, no ground for recovery of damages exists. 12.

Damages sought from an undertakers' protective association charged with libeling an outside concern. 263.

LICENSE—

Validity of the salary and chattel loan license law. 209.

The exhibition of a licensed moving picture film can not be interfered with by municipal officers. 465.

LIENS—

A non-resident creditor for machinery and materials and the labor required in their installation, who has complied with the statutory provisions for perfection of his lien, is not estopped from enforcing his lien by a specific provision in the contract of sale that the title should remain in the seller and should retain its personal character until fully paid. 113.

A sub-contractor, engaged in stripping a gravel pit, preparatory to the use of the gravel as ballast for a railway, is engaged in furnishing labor and material for use in the construction of a railroad, and one who rents a steam shovel to such sub-contractor for said work is within the class of those who furnish tools and implements on the order of a sub-contractor and is entitled to a lien. 129.

In a contest between the head contractor and the owner of a steam shovel, used as above by a sub-contractor, the burden is on the head contractor to show payment in full prior to notice. 129.

LIMITATION OF ACTIONS—

Bar of the statute interposed in an action to enforce an agreement among heirs as to payment of the debts of the estate. 43.

Where the county has paid money to the wrong official, the six years statute of limitations

runs against an action for its recovery from the date the action accrued, and not from the filing of the report with reference thereto by the bureau of inspection and supervision of public offices. 218.

MANDAMUS—

To compel transfer of territory from one school district to another. 88.

MASTER AND SERVANT—

The general servant of one master becomes the special servant of another to such extent as to relieve the former from liability for the servant's negligence when the servant is placed under the control of the special master. 153.

An employee, about to use a ladder, has greater opportunity than the employer to learn of its defects and is chargeable with knowledge thereof. 557.

Where a plaintiff has sued both master and servant for damages caused by negligence, and has elected to proceed against the servant, his request to have a separate cause of action docketed against the master will not be granted for the reason that there is no statutory authority for such procedure. 561.

A petition against master and servant, which on its face is not demurrable, but which is subject to a motion to elect after the close of the plaintiff's case, sets up but one cause of action. 561.

MECHANICS' LIENS—

The sworn statement which the statute requires shall be served on the owner in order to perfect a mechanic's lien need not be served prior to the time of filing of the affidavit for lien in the recorder's office, but may be served at any time before the time for filing the lien expires, the lien not becoming effective until the statement is served. 229.

The affidavit for lien must be filed in the office of the recorder within sixty days after completion

of the work for which a lien is being taken. 229.

Where material is furnished for a building during the summer of one year and during the summer of the next year an additional order is given for the same kind of material for the purpose of repairing damage to the building caused by the elements during the intervening winter, the time for filing the lien begins to run from the time the main portion of the material was furnished and not from the delivery of the later material. 229.

MISJOINDER—

Of causes of action in a suit on a promissory note. 241.

MISTAKE—

Money paid by county to wrong official; action for its recovery; application of the statute of limitations; when such an action accrues; no right of subrogation in county. 218.

MORTGAGE—

Where the circumstances surrounding the execution of a deed are such as to require that it be treated as a mortgage, and the mortgagee by conveying the property to an innocent party has put it out of his power to restore it to the mortgagor under his right of redemption, the mortgagor will be given a redemption judgment, equal to the difference in the value of the land at the date of trial and the amount due under the mortgage with interest. 40.

MOTOR VEHICLES—

In an action brought by the operator of a motor vehicle for damages for personal injuries received in a collision with an interurban car, which was being negligently operated at a grade crossing, the fact that the motor vehicle was not registered as required by law constitutes no defense. 164.

Limitation on the amount which may be recovered on account of injuries growing out of an automobile accident. 426.

MUNICIPAL CORPORATIONS—

A municipal corporation, in the construction and maintenance of a sewage disposal plant, acts in a governmental and not in a proprietary capacity, and no cause of action is stated against a municipality by the allegation that the plant was so negligently constructed that the contents escaped, and percolating through the earth, contaminated a well from which plaintiff obtained water, with the result that she was stricken with typhoid fever. 17.

Liability of a municipality for negligent construction of a plant while acting in its governmental capacity; mistake in design distinguished from negligence in construction or operation. 17.

An assessment can not be enforced for curbs and gutters, under an ordinance providing for a general improvement of the street, against abutting owners who have previously provided their property with similar curbs. 65.

Appropriation of property for a street extension is a public improvement. 145.

A referendum with reference to a street extension must be taken from the resolution declaring an intention to appropriate the property, and not from the appropriating ordinance. 145.

That a municipality has appropriated money in excess of its revenues is a matter of no concern to a party dealing with it who receives his money in due course, and such a situation does not afford ground for refusing relief from the forfeiture of a lease held by it. 257.

The Burns law has no application to a year's rental appropriated out of a lawful issue of bonds, nor can said law be construed as applying to rental for subsequent years under the same lease. 257.

A lease entered into by the proper officers of a municipality for property needed for municipal purposes, is not rendered invalid

by reason of the fact that it is a contract involving an expenditure of more than \$500 and was not approved by the board of control. 257.

The power of a court to declare an ordinance unreasonable should be restricted to cases where the Legislature has enacted nothing on the subject-matter of the ordinance. 302.

Power of a municipality to prohibit by ordinance the having in possession of racing memoranda; penalties for such an offense which must be regarded as not excessive. 302.

A resolution by a city council, declaring the necessity of issuing bonds in excess of the permissible amount for the erection of a public hall for auditorium and exposition purposes and acquiring the land necessary therefor, is not an emergency resolution within the provisions of the state Constitution and the charter of the city of Cleveland. 305.

The city of Cleveland has authority to build a hall for auditorium purposes and to issue bonds therefor, and may use such auditorium for any lawful purpose and derive revenue for such use; but there is no authority to issue bonds for a building primarily for exposition purposes, or lodge rooms, concert halls, show rooms, etc., as a purely private enterprise. 305.

An action by a director of law-brought in good faith, is an action on behalf of every tax-payer in the city; such an action is *res judicata*, when. 305.

In the absence of adoption of any plan or design by the city for such a proposed auditorium, allegations as to its contemplated use are anticipatory, speculative and premature, and can not be brought before a court for adjudication. 305.

In designing such a building, the municipality may lawfully provide rooms other than the auditorium for purely civic and municipal purposes; and when not needed for municipal purposes the city may derive revenue for the use of such rooms by lease or otherwise. 305.

Function of municipal government; limitations on the power of taxation; judicial construction of the words "public purpose"; is a convention hall a public utility? 305.

A bond securing deposits made by a city or village in a designated depository, under the provisions of Section 4295, G. C., is a statutory bond into which the provisions of the statute must be read, and the surety must be regarded as having contracted with reference to the statutory provisions. 385.

A bond in the sum of \$10,000 secures deposits in the sum of \$9,091 only, and where deposits are made in excess of that sum and the bond is not increased correspondingly, and the depository becomes insolvent, the amount recoverable under the bond is ascertained by deducting from \$9,091 all dividends received and assessing against the surety what remains unpaid of that sum with interest. 385.

Where the mayor of a city allows himself, from whatever motive, to become so identified with the building of a street railway that his pecuniary interests will be promoted by obtaining advantageous grants from the city for the company, such grants are corrupted and must be treated as void. 577.

MUNICIPAL COURTS—
See COURTS.

NECESSARIES—

In an attachment of a debtor's wages on a claim for necessities, the affidavit should plainly state that it is only ten per cent. which it is sought to attach. 173.

NEGLIGENCE—

A driver and team sent by the owner to deliver Christmas packages under the direction of a Santa Claus committee becomes the special servant of said committee, and his general employer is not liable for his negligence while so engaged. 153.

Collision between an automobile and an interurban car which was being negligently operated at a grade crossing; defense that the automobile was not registered does not lie. 164.

A railway company engaged in interstate commerce can not contract for exemption from liability in the event of injury to the employee with whom the contract is made. 169.

A presumption of negligence arises where a passenger on a scenic railway is injured by the car jumping from the track, but the presumption springs from the nature of the accident and the attendant circumstances and not from the mere fact of the accident itself. 445.

A ladder is a simple tool and an employer has the right of defense of assumed risk and contributory negligence where an employee has been injured while using one which proved defective. 557.

Nature of an action against both master and servant for damages for injuries caused by negligence. 561.

NEW TRIAL—

May be granted because of disorder among counsel during the trial, accompanied by offensive conduct, notwithstanding the judgment is supported by the evidence. 289.

The fact that questions put by jurors to witnesses might be taken as indicating they had reached a conclusion on the merits of the case prior to the close of the evidence, does not require that a new trial be granted, where the ver-

dict returned is in accordance with the evidence. 495.

NUISANCE—

Where rest and comfort was interfered with at night by the vibrations of a factory engine. 70.

A reduction company may be enjoined from emitting offensive odors, but execution of its contracts can not be interfered with. 109.

The operation of heavy machinery in a steel plant can not be enjoined by owners of residence property, where it appears that the factory is located in a factory district, and is separated from the property in question by a stream of water and a railway operating sixty-four trains per day, and the trains cause more smoke and vibration than does the factory, and the parties complaining acquired their property, with one exception, after the factory had begun operations. 529, 531.

The doctrine of *res judicata* applies in cases where injunctive relief is sought against vibration causing injury to residence property, unless the vibrations are greater than those complained of in the former litigation involving the same issues and between the same parties. 531.

Injunctive relief will not be granted unless the proof is clear and convincing, tending to show irreparable damage for which no adequate relief can be had at law. 531.

A right of action based on nuisance lies in a tenant as well as the landlord. 17.

OFFICE AND OFFICER—

County commissioners are without power to fix the compensation of deputies and assistant clerks of the county auditor, treasurer, probate judge and recorder, but the authority so to do is fixed in these several officers, with the limitation that the aggregate compensation to be paid in each office shall

not exceed the amount allowed by the county commissioners for such office. 97.

Money paid by a county to the wrong official; action for its recovery; no right of subrogation in the county; application of the statute of limitations; when such an action accrues. 218.

The common pleas judges of Ohio are not state officers, but act in a dual capacity, partly for the state and partly for the county in which they serve. 337.

The court of common pleas is without power to declare forfeiture of an office for violation of the corrupt practices act, until the accused has been convicted in due form as provided by statute. 523.

PARENT AND CHILD—

Where the best interests of the child seem to require that its custody be permitted to remain undisturbed, no order changing the custody will be granted, notwithstanding the child was kidnapped from an adjoining state by the parent now having its custody. 438.

Where an indictment charges a father with failure to support his two boys under sixteen years of age, and it appears from the evidence that by consent of all parties in interest one of the boys has been given a good home by his grandparents, the defendant may be acquitted of the charge as to that boy but convicted as to the other, notwithstanding the charge as to both is contained in one count. 463.

PARTITION—

Land sold in partition, in which an heir participates and shares in the proceeds, can not thereafter be sold by the administrator to satisfy an indebtedness to the same heir which was not disclosed at the time of the partition. 273.

PARTNERSHIP—

A partnership indebtedness is not covered by a bond covering individual indebtedness. 177.

PLEADING—

An answer to the original petition makes unnecessary an answer to an amended petition, when. 75.

An amendment will be permitted to a petition where it tends to so shape the pleadings as to permit of a determination of all the issues presented. 191.

An answer which sets up a case different from that claimed by the plaintiff does not plead an affirmative defense. 513.

In an action to recover damages to a shipment of goods which was diverted by reason of a physical necessity from the route prescribed. 574.

In an action for damages for shortage of land conveyed by metes and bounds under a deed of general warranty the mere statement of the breach is not enough, but the fact or facts which show the breach must also be shown. 604.

PRESUMPTION—

When a landlord accepts rent at the original rate from a tenant who has held over, he will be presumed to intend to accept the tenant as a tenant for the year. 1.

A presumption can not be based on a presumption. 81.

PROBATE JUDGE—

Amount which a candidate for probate judge may expend in promoting his election. 523.

PROMISSORY NOTES—

See BILLS, NOTES AND CHECKS.

RAILWAYS—

A sub-contractor, engaged in "stripping" a gravel pit, preparatory to use of the gravel as ballast on a railroad, is engaged in furnishing labor and material for the construction of a railroad, and

persons furnishing implements to him are entitled to a lien. 129.

A contract of exemption from liability for injury can not be entered into between a railway company, engaged in interstate commerce, and one of its employees. 169.

A railway company which has leased its line to an operating company is exempt from payment of the state franchise tax, where the operating company is required to and does report and pay the excise tax. 234.

RECEIVERS—

A receiver in bringing a suit to recover double statutory liability from stockholders is limited by the terms of the judgment in the parent suit, and where the judgment is in part against executors in their representative capacity a petition seeking to recover from them as individuals is open to demurrer. 333.

REFERENLUM—

Where with reference to a street extension must be taken from the resolution declaring an intention to appropriate, and not from the appropriating ordinance. 145.

REMAINDER—

Devise of life estate to sons with the fee to the children of the surviving life tenant creates a contingent and not a vested remainder. 566.

RES JUDICATA—

An action brought in good faith by a director of law is an action on behalf of every tax-payer of the city and the judgment entered therein is *res judicata* as to all questions raised by such action or which might have been raised and determined therein. 305.

SALARY ACT—

Authority to fix the salaries of deputies and clerks in the several county offices is in the heads of those officers. 97.

SALARY LOAN ACT—

Validity of the act providing for the licensing of those engaged in making loans on personal property or wage earnings. 209.

SCENIC RAILWAY—

A person controlling and operating an amusement device known as a scenic railway is a carrier of passengers, and is bound to exercise the highest degree of care for the safety of such passengers and to do all that human foresight and vigilance can do, consistent with the mode of conveyance and the practical operation of the business. 445.

SCHOOLS—

Jurisdiction where county boards are unable to agree as to the division of funds and indebtedness where a transfer of territory has been made; common pleas court without authority to act. 398.

Where fifty per cent. of the electors of a county school district petition for transfer to another school district, the county board of education may order that the transfer be made; but if the petition contain the names of seventy-five per cent. or more of the said electors, the making of such an order and the passing of the petition on for further proceedings, as provided by statute, is mandatory. 88.

SCINTILLA RULE—

Application of, where a motion has been made for a finding and judgment on plaintiff's evidence. 193.

SEWERS—

A municipal corporation is not liable to one who claims that through the negligent construction of its sewer disposal plant the contents percolated through the earth and caused the plaintiff to suffer from typhoid fever on account of contamination of the well from which water was used. 17.

STATUTE OF FRAUDS—

A parol agreement between a landlord and tenant, while the latter is in possession, to create a subsequent tenancy from month to month, is within the statute of frauds. 1.

STATUTES—

Effect of a declaration of emergency in the enactment of a statute. 164.

STATUTES CONSIDERED—

Section 4696, as amended, having reference to the duty of a school board upon the filing of a petition for transfer of territory from one school district to another. 88.

Sections 9 and 28, providing procedure for the Municipal Court of Cincinnati. 94.

Section 1292, providing upon whom service may be had by publication. 104.

Section 6341-1, known as the chattel loan license law. 209.

Sections 286-1, 2, 3, relating to the bureau of inspection and supervision of public offices. 218.

Section 1465-1, *et seq.*, providing for a franchise tax and known as the Hollinger law. 234.

Section 10505, relating to the execution of wills. 225.

Section 8312, relating to mechanic's liens. 229.

Section 4403, providing when the board of control of a municipality shall approve contracts. 257.

Section 1455, as amended, making it competent for a jury to return a verdict upon concurrence of two-thirds of its members thereof. 267.

Section 11678, relating to notice of sale of lands by judicial procedure. 286.

Section 3628, relating to the power of municipalities to enact ordinances against misdemeanors and to provide penalties therefor. 302.

Section 2252, providing for payment by counties of additional salary to common pleas judges. 337.

Section 11257, providing when one or more may sue or defend for all. 375.

Section 4295, providing for the giving of security by depositaries of city or village funds. 385.

Section 8640, providing for appointment of inspectors of a corporate election. 545.

Section 10266, relating to service of summons upon a garnishee who is a person. 555.

Section 13047, prohibiting barbering on Sunday. 606.

STOCKHOLDERS—

In an action by a receiver to recover statutory liability under a judgment which is in part against executors in their representative capacity, recovery can not be had against the said executors in their individual capacity. 333.

STREET RAILWAYS—

Collateral attack on grant. 577.

STREETS—

The appropriation of property for a street extension is a public improvement. 145.

STRIKES—

During a strike of employees of a hotel, the activities of the strikers while in the immediate vicinity of the hotel may be limited by injunction to the maintenance of two pickets on each street upon which the building fronts, who must not approach nearer the building than the middle of the street, or conduct themselves in other than a peaceable manner, and they may not circulate cards derogatory of the hotel or its service, or announce that a strike is on in other than a moderate tone of voice; and crowds of strikers or their sympathizers may be enjoined from gathering within the limits mentioned, or from indulg-

ing in bolsterous conduct, or jostling or interfering with guests or employees entering or leaving the building. 375.

SUBROGATION—

Where a county pays money to the wrong official, no right of subrogation arises in favor of said county. 218.

SUMMONS—

Exclusion of a stockholder from the right to vote at a corporate election deprives him of a property right and affords ground for constructive service. 104.

Service of summons can not be had upon the president of a corporation which is not a resident of Ohio and is not doing business in this state. 104.

A plaintiff in an action for alimony is entitled to service of summons on a cross-petition asking divorce from plaintiff. 120.

Validity of personal service issued by the Municipal Court of Cincinnati against a non-resident of Cincinnati township. 125.

In a proceeding in attachment, where the garnishee is a person, the copy of the order and notice should be served on him personally or left at his usual place of residence. Service on a manager for a person doing business under a fictitious name, which is not a partnership, does not constitute a valid service. 555.

SUNDAY LAWS—

Section 13047, which prohibits barbering on Sunday, is *in pari materia* with statutes against Sabbath desecration which contain an exception in favor of persons who conscientiously observe the seventh day of the week as the Sabbath, and the exception may therefore be read into said section; and it follows that a barber who keeps his shop closed from sundown Friday to sundown Saturday, refraining from all work and observing said time as a holy day, may interpose such fact as a defense against

prosecution for barbering on Sunday. 606.

SURETIES—

Equivocal language will be construed against a principal who has furnished that particular form of bond for the purpose of having it executed by the surety. 177.

A surety on a bond covering individual indebtedness is not bound to make good the indebtedness of a partnership of which the said individual is a member but knowledge of which was not brought home to the surety. 177.

A bond covering deposits of a city or village provides security only to an amount within ten per cent. of the face of the bond, notwithstanding the deposits greatly exceed that amount. 385.

TAXATION—

A railway company which has leased its line to an operating company is exempt from payment of the state franchise tax, where the operating company is required to and does report and pay the excise tax. 234.

Limitations on the power of taxation. 305.

TAX-PAYER—

An action brought in good faith by a director of law is an action on behalf of every tax-payer of the municipality; such an action is *res judicata*, when. 305.

TIME—

For filing a mechanic's lien and also for serving a sworn statement upon the owner. 229.

TITLE—

Alienation of, contrary to a stipulation in a fire insurance policy, where the owner of the property conveyed a one-half interest to his wife to whom he was married subsequent to the issuance of the policy. 133.

Course of title not changed, where property devised to a widow

for life, to be reduced to dower in case of her remarriage, by her purchase of the fee but without consideration. 161.

In a purchaser at a sale in partition good in the purchaser as against an action by the administrator to sell the same land to satisfy an indebtedness, previously undisclosed, to one of the heirs who participated in the partition and shared in the proceeds. 273.

TRIAL—

Where an action at law is tried to the court and at the conclusion of plaintiff's testimony a motion is made for a finding and the judgment of the court thereon, the motion should be treated as though it were to direct the jury to return a verdict for the defendant. 193.

A motion for a finding and the judgment of the court on such finding, where interposed at the conclusion of the plaintiff's evidence, should be overruled if the evidence is of such a character that where the motion is one for a directed verdict for the defendant, instead of for a finding and judgment, the scintilla rule would require that it be overruled. 193.

Scenes of disorder among counsel, accompanied by offensive conduct, may afford ground for granting a new trial, notwithstanding the judgment is supported by the evidence. 289.

TRUSTS—

A trust is not created where the object or person intended is not ascertainable. 81.

A purchaser of goods in bulk will be declared a trustee under the bulk sales statute, when. 415.

The trust created by the testator, William Neil, running through the lives of three classes of persons, is a trust connected with the office and not exclusively with the person named in the will as trustee, and the powers and duties conferred on the trustee, including the power to convey land by good and sufficient title, is a power run-

ning through the life of the trust, to be exercised successively by the person or persons upon whom execution of the trust for the time being devolves. 449.

VALENTINE ANTI-TRUST LAW—

Under the provisions of the Valentine anti-trust law damages can be recovered for only such acts as are expressly forbidden by the act, and the provisions of the act should not be given a wider scope than its terms fairly import; but a combination of persons formed for the purpose of boycotting those who refuse to become members of their organization and the combining of such organization with a labor union in furtherance of said boycott is a combination to create and carry out restrictions in trade or commerce within the meaning of said act. 263.

VENDOR AND PURCHASER—

Where a dwelling is built for a purchaser on grounds owned by the vendor who was the contractor for the building, the purchaser agreeing to assume a mortgage upon delivery of the deed, an action by the purchaser for breach of contract as to compliance with certain building specifications does not survive acceptance of the deed. 206.

VERDICT—

Can not be returned in an appropriation proceeding upon concurrence of three-fourths of the jury. 267.

Should not be set aside by the trial judge because of conflicting evidence which would lead different minds to different conclusions, but where the jury disregard the law as given them by the court and reach a conclusion not supported by the undisputed facts of the case, the court should not hesitate to set aside their verdict. 513.

WIDOW—

A widow who elects to take un-

der her husband's will without being adequately advised by the probate judge is not estopped from denying an election, nor do conduct or declarations bind her where not based on full knowledge as to her rights. 401.

WILLS—

No trust is created where the object or person intended is not ascertainable; presumptions can not be based upon presumptions; commands or recommendations to a donee; construction of the words "my family"; an estate in fee can not be reduced to an estate in tail by language of doubtful meaning. 81.

Payment of a legacy within eighteen months from the appointment of the executor can not be compelled by suit in the common pleas court. 184.

Where payment of a legacy is desired within eighteen months from the appointment of the executor, application should be made to the probate court and bond given as provided in Section 10762. 184.

The testimony of one competent witness to a will, that all formalities necessary to its due execution were complied with by the testator, is sufficient proof, if believed, for admission of the will to probate, notwithstanding the other witness to the will fails to remember or denies compliance with one or more of the essential statutory requirements to its due attestation. 225.

A widow is not estopped from denying that she elected to take under the will of her husband, where her action was not based on full knowledge of her rights. 401.

As to the power of successive trustees to convey land under a trust created by the testator and running through three generations. 449.

While the contest of a will, pending its determination, is an impediment to payment of a legacy thereunder, it does not stop the running of interest on the legacy from the date it would otherwise have become payable. 507.

Where a devise was made of a life estate to sons with fee to the children of the last life tenant; contingent and not a vested remainder thereby created, and quitclaim deed ineffectual to convey such estate; restoration of purchase money paid for such interest ordered in partition proceedings. 566.

WORDS AND PHRASES—

Construction of the words "my family." 81.

Meaning of the words "regularly employed" as used in the workmen's compensation act. 186.

Construction of the words "public purpose." 305.

WORKMEN'S COMPENSATION—

Compensation is payable, under the workmen's compensation act, to those injured in the course of their employment, and not to those injured during the period of their employment. 62.

The words "regularly employed," as used in the workmen's compensation act, requires that the business be one in which five or more men are regularly employed, but does not forbid changes in the personnel of the employees. 186.

A wife does not cease to be "dependent" upon her husband, within the meaning of the workmen's compensation law, by reason of his failure to support her, and an award may be made in the case of a wife whose husband was killed in the course of his employment after deserting her, without her fault, and taking up with another woman. 251.

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